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No. 12456

United States
Court of Appeals
for the Ninth Circuit.

ESTATE OF R. L. LANGER, Deceased, ELEA-
NORE LANGER, Executrix, ELEANORE
LANGER, C. ABBOTT LINDSEY and PAU-
LINE LINDSEY,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

MAR 18 1950

PAUL P. O'BRIEN,

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

CLERK

No. 12456

**United States
Court of Appeals
for the Ninth Circuit.**

ESTATE OF R. L. LANGER, Deceased, ELEA-
NORE LANGER, Executrix, ELEANORE
LANGER, C. ABBOTT LINDSEY and PAU-
LINE LINDSEY,

Petitioners,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

DANA LATHAM, Esq.,

AUSTIN H. PECK, Jr., Esq.,

HENRY C. DIEHL, Esq.,

1112 Title Guarantee Building

411 West Fifth Street

Los Angeles 13, California.

For Respondent:

L. C. AARONS, Esq.,

Special Attorney,

Bureau of Internal Revenue.

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APPEARANCES

For Petitioner:

DANA LATHAM, Esq.,

AUSTIN H. PECK, Jr., Esq.,

HENRY C. DIEHL, Esq.,

1112 Title Guarantee Building

411 West Fifth Street

Los Angeles 13, California.

For Respondent:

L. C. AARONS, Esq.,

Special Attorney,

Bureau of Internal Revenue.

The Tax Court of the United States

Docket No. 16756

R. L. LANGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:LHP) dated September 24, 1947, and as a basis of this proceeding alleges as follows:

I.

Petitioner is an individual residing at 939 South Figueroa Street, Los Angeles 15, California. Petitioner's income tax return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California.

II.

The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A," was mailed to petitioner on September 24, 1947.

III.

The taxes in controversy are federal income taxes for the calendar year 1944, in the amount of \$3,086.48.

IV.

The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) The respondent erroneously computed the tax upon \$5,000.00, representing petitioner's community one-half of \$10,000.00 compensation for personal services attributable to the years 1937, 1938, and 1939, upon the basis of including all of said sum in petitioner's 1944 income and taxing said entire amount at the rates applicable for the year 1944 rather than at the rates applicable for the years 1937, 1938, and 1939.

(2) Respondent erroneously failed and refused to compute the tax upon said \$5,000.00 of income at the rates applicable for the years 1937, 1938, and 1939, to which years said income was attributable.

(3) The respondent erroneously determined that the provisions of Section 107 of the Internal Revenue Code are not applicable in the computation of petitioner's tax for the calendar year 1944 and erroneously failed and refused to apply said section in making such computation.

V.

The facts upon which petitioner relies as a basis for this proceeding are as follows:

(1) During the years 1937 through 1944 and up to and including the present date, petitioner has been an officer of the Commodore Hotel Co., Ltd.,

1203 West Seventh Street, Los Angeles, California. Said corporation keeps its books and files its income tax returns on the cash receipts and disbursements basis.

(2) By appropriate action of its board of directors, evidenced by proper corporate resolution, Commodore Hotel Co., Ltd., undertook and agreed to pay to petitioner monthly from and after January 1, 1937, a salary of \$600.00 per month, said salary to continue monthly without interruption.

(3) During each of the years 1937, 1938 and 1939 said corporation suffered deficits from its operations and its capital was impaired. It owed substantial amounts to outside creditors. Because of its straitened circumstances it was unable, during each of said years, to pay to petitioner the full amount of salary which it had been authorized by its board of directors to pay, and which it had agreed to pay. The corporation, however, at all times recognized its liability for the full amount authorized to be paid to petitioner.

(4) During the year 1944 said corporation first found itself in a financial position which would permit it to pay to petitioner a portion of the back salary theretofore unpaid. During said year it actually paid to petitioner the sum of \$10,000.00 on account of said back salary, which amount was attributable to the discharge, to the extent possible, of the unpaid salary of petitioner for the years 1937, 1938, and 1939.

(5) In preparing his federal income tax return for the calendar year 1944 petitioner and his wife reported as community property the receipt of said \$10,000.00 and computed the tax thereon in accordance with the provisions of Section 107 (d) of the Internal Revenue Code. The respondent has refused to permit the application of said section of the Internal Revenue Code in the computation of petitioner's tax for said year.

Wherefore petitioner prays that this court may hear this proceeding and determine:

(1) That respondent erred in the particulars set forth in paragraph IV of this petition.

Respectfully submitted,

/s/ DANA LATHAM,

/s/ AUSTIN H. PECK,

/s/ HENRY C. DIEHL,

Counsel for Petitioner.

December 11, 1947.

State of California,

County of Los Angeles—ss.

R. L. Langer, being first duly sworn, deposes and says: That he is the petitioner in the foregoing petition; that he has read said petition and is familiar with the facts contained therein, and that

said facts are true and correct to the best of his knowledge and belief.

/s/ R. L. LANGER.

Subscribed and sworn to before me this 12th day of December, 1947.

[Seal] /s/ ISOBEL V. HUGHES,
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT A

Form 1279

Treasury Department Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Sept. 24, 1947.

Office of
Internal Revenue Agent in Charge
Los Angeles Division
LA:IT:90D:LHP
Mr. R. L. Langer
c/o Hotel Figueroa
939 South Figueroa Street
Los Angeles 15, California

Dear Mr. Langer:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1944, discloses a deficiency of \$3,086.48, as shown in the statement attached.

In accordance with the provisions of existing in-

ternal revenue law notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEORGE J. SCHOENEMAN,

Commissioner,

By /s/ GEORGE D. MARTIN,

Internal Revenue Agent
in Charge.

Enclosures:

Statement

Form of waiver.

Statement

LA:IT:90D:LHP

Mr. R. L. Langer

c/o Hotel Figueroa

939 South Figueroa Street

Los Angeles 15, California

Tax Liability for the Taxable Year

Ended December 31, 1944

Deficiency

Income tax\$3,086.48

In making this determination of your income tax liability careful consideration has been given to the report of examination dated March 21, 1947.

Adjustment to Net Income

Taxable Year Ended December 31, 1944

Net income as disclosed by return.....\$29,912.40

Additional income:

(a) Compensation unreported..... 500.00

 Net income adjusted.....\$30,412.40

Explanation of Adjustment

(a) There is added to income the amount of \$500.00 representing your community share of the value of living quarters and meals furnished you by your employer, during this taxable year, which you failed to report in your return.

In your return you disclose receipt in 1944 of compensation for personal services in the amount

of \$5,000.00 (your community one-half of \$10,000.00) attributable to the years 1937, 1938 and 1939, which you include in gross income. However, in the computation of your tax this income is excluded and the tax attributable to such income, computed at the lower rates in effect for such prior years, is added to the amount computed without regard to such income, the total of which is reported as your income tax liability for 1944.

It has been determined that the provisions of sections 107 of the Internal Revenue Code are not applicable, and that the aforementioned \$5,000.00 represents income taxable at the rates in effect in the year received.

Computation of Tax		
Taxable Year Ended December 31, 1944		
Net income adjusted	\$30,412.40	
Less: Surtax exemption	500.00	
	<hr/>	
Surtax net income	\$29,912.40	
Surtax		\$13,165.69
Net income adjusted	\$30,412.40	
Less: Normal-tax exemption	500.00	
	<hr/>	
Net income subject to normal tax	\$29,912.40	
Normal tax at 3%		897.37
		<hr/>
Correct income tax liability		\$14,063.06
Income tax liability shown on return		
account No. 9005526		10,976.58
		<hr/>
Deficiency of income tax		\$ 3,086.48

Received and filed T.C.U.S. Dec. 17, 1947.

Served Dec. 18, 1947.

[Title of Tax Court and Cause.]

ORDER

On suggestion of death of the petitioner and notice of the appointment of an Executrix filed in the above-entitled proceeding, it is

Ordered, that Eleanore Langer, Executrix of the Estate of R. L. Langer, deceased, be substituted as petitioner in the place and stead of R. L. Langer, deceased, and that henceforth the caption of this proceeding shall be "Estate of R. L. Langer, deceased, Eleanore Langer, Executrix, Petitioner v. Commissioner of Internal Revenue, Respondent, Docket Number 16756."

[Seal] /s/ JOHN W. KERN,
 Judge.

Dated: Washington, D. C., August 31, 1948.
cgh

Served Aug. 31, 1948.

The Tax Court of the United States

Docket No. 16757

ELEANORE LANGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:LHP) dated September 24, 1947, and as a basis of this proceeding alleges as follows:

I.

Petitioner is an individual residing at 939 South Figueroa Street, Los Angeles 15, California. Petitioner's income tax return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California.

II.

The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A," was mailed to petitioner on September 24, 1947.

III.

The taxes in controversy are federal income taxes for the calendar year 1944, in the amount of \$3,099.06.

IV.

The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) The respondent erroneously computed the tax upon \$5,000.00, representing petitioner's community one-half of \$10,000.00 compensation for personal services paid to her husband and attributable to the years 1937, 1938, and 1939, upon the basis of including all of said sum in petitioner's 1944 income and taxing said entire amount at the rates applicable for the year 1944 rather than at the rates applicable for the years 1937, 1938, and 1939.

(2) Respondent erroneously failed and refused to compute the tax upon said \$5,000.00 of income at the rates applicable for the years 1937, 1938, and 1939, to which years said income was attributable.

(3) The respondent erroneously determined that the provisions of Section 107 of the Internal Revenue Code are not applicable in the computation of petitioner's tax for the calendar year 1944 and erroneously failed and refused to apply said section in making such computation.

V.

The facts upon which petitioner relies as a basis for this proceeding are as follows:

(1) During the years 1937 through 1944 and up to and including the present date, petitioner's husband has been an officer of the Commodore Hotel Co., Ltd., 1203 West Seventh Street, Los Angeles, California. Said corporation keeps its books and files its income tax returns on the cash receipts and disbursements basis.

(2) By appropriate action of its board of directors, evidenced by proper corporate resolution, Commodore Hotel Co., Ltd., undertook and agreed to pay to petitioner's husband monthly from and after January 1, 1937, a salary of \$600.00 per month, said salary to continue monthly without interruption.

(3) During each of the years 1937, 1938 and 1939 said corporation suffered deficits from its operations and its capital was impaired. It owed substantial amounts to outside creditors. Because of its straitened circumstances it was unable, during each of said years, to pay to petitioner's husband the full amount of salary which it had been authorized by its board of directors to pay, and which it had agreed to pay. The corporation, however, at all times recognized its liability for the full amount authorized to be paid to petitioner's husband.

(4) During the year 1944 said corporation first found itself in a financial position which would permit it to pay to petitioner's husband a portion of the back salary theretofore unpaid. During said year it actually paid to petitioner's husband the

sum of \$10,000.00 on account of said back salary, which amount was attributable to the discharge, to the extent possible, of the unpaid salary of petitioner's husband for the years 1937, 1938, and 1939.

(5) In preparing her federal income tax return for the calendar year 1944 petitioner and her husband reported as community property the receipt of said \$10,000.00 and computed the tax thereon in accordance with the provisions of Section 107 (d) of the Internal Revenue Code. The respondent has refused to permit the application of said section of the Internal Revenue Code in the computation of petitioner's tax for said year.

Wherefore petitioner prays that this court may hear this proceeding and determine:

(1) That respondent erred in the particulars set forth in paragraph IV of this petition.

Respectfully submitted,

/s/ DANA LATHAM,

/s/ AUSTIN H. PECK, JR.,

/s/ HENRY C. DIEHL,

Counsel for Petitioner.

December 11, 1947.

State of California,
County of Los Angeles—ss.

Eleanore Langer, being first duly sworn, deposes and says: that she is the petitioner in the foregoing petition; that she has ready said petition and is familiar with the facts contained therein, and that said facts are true and correct to the best of her knowledge and belief.

/s/ ELEANORE LANGER.

Subscribed and sworn to before me this 13th day of December, 1947.

[Seal] /s/ D. C. WALTER,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires Aug. 11, 1950.

EXHIBIT A

Form 1279

Treasury Department, Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Office of
Internal Revenue Agent in
Charge

Sep 24, 1947

Los Angeles Division

LA:IT:90D:LHP

Mrs. Eleanore Langer

c/o Hotel Figueroa

939 South Figueroa Street

Los Angeles 15, California

Dear Mrs. Langer:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1944 discloses a deficiency of \$3,099.06, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward

it to the Internal Revenue Agent in Charge, Los Angeles, California for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours, ,

GEORGE J. SCHOENEMAN,

Commissioner,

By /s/ GEORGE D. MARTIN,

Internal Revenue Agent
in Charge.

Enclosures :

Statement

Form of waiver

Statement

LA:IT:90D:LHP

Mrs. Eleanore Langer

c/o Hotel Figueroa

939 South Figueroa Street

Los Angeles 15, California

Tax Liability for the Taxable Year

Ended December 31, 1944

Deficiency

Income tax\$3,099.06

In making this determination of your income tax liability careful consideration has been given to the report of examination dated March 21, 1947.

Adjustment to Net Income

Taxable Year Ended December 31, 1944

Net income as disclosed by return.....\$31,037.39

Additional income:

(a) Compensation unreported 500.00

Net income adjusted\$31,537.39

Explanation of Adjustment

(a) There is added to income the amount of \$500.00 representing your community share of the value of living quarters and meals furnished you by your husband's employer, during this taxable year, which you failed to report in your return.

In your return you disclose receipt in 1944 of compensation for personal services in the amount of \$5,000.00 (your community one-half of \$10,000.00) attributable to services rendered by your husband in the years 1937, 1938 and 1939, which you include in gross income. However, in the computation of your tax this income is excluded and the tax attributable to such income, computed at the lower rates in effect for such prior years, is added to the amount computed without regard to such income, the total of which is reported as your income tax liability for 1944.

It has been determined that the provisions of section 107 of the Internal Revenue Code are not applicable, and that the aforementioned \$5,000.00 represents income taxable at the rates in effect in the year received.

Computation of Alternative Tax
Taxable Year Ended December 31, 1944

Net income adjusted	\$31,537.39
Less: Excess of net long-term capital gain over net short-term capital loss	1,125.00
Ordinary net income	\$30,412.39
Less: Surtax exemption	500.00
Balance (surtax net income)	\$29,912.39
Surtax on \$29,912.39	13,165.68
Ordinary net income	\$30,412.39
Less: Normal tax exemption	500.00
Balance subject to normal tax	\$29,912.39
Normal tax (3 per cent of \$29,912.39)	897.37
Partial tax	\$14,063.05
Plus: 50 per cent of \$1,125.00	562.50
Alternative tax	\$14,625.55

Computation of Tax
Taxable Year Ended December 31, 1944

Net income adjusted	\$31,537.39
Less: Surtax exemption	500.00
Surtax net income	\$31,037.39
Surtax	\$13,863.18
Net income adjusted	\$31,537.39
Less: Normal-tax exemption	500.00
Net income subject to normal tax	\$31,037.39
Normal tax at 3%	931.12
Total normal tax and surtax	\$14,794.30
Alternative tax	\$14,625.55
Correct income tax liability	\$14,625.55
Income tax liability shown on return, account No. 9022948	\$11,526.49
Deficiency of income tax	\$ 3,099.06

Received and filed T.C.U.S. Dec. 17, 1947.

Served Dec. 18, 1947.

The Tax Court of the United States

Docket No. 18396

C. ABBOTT LINDSEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:LHP) dated February 19, 1948, and as a basis of this proceeding alleges as follows:

I.

Petitioner is an individual residing at 1203 West Seventh Street, Los Angeles 14, California. Petitioner's income tax return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California.

II.

The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A," was mailed to petitioner on February 19, 1948.

III.

The taxes in controversy are federal income taxes for the calendar years 1944 and 1945, as follows:

1944	\$2,041.07
1945	2,867.32
<hr/>	
Total	\$4,908.39

IV.

The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) The respondent erroneously computed the tax upon \$4,400.00, representing petitioner's community one-half of \$8,800.00 compensation for personal services paid to him and attributable to the years 1938 and 1939, upon the basis of including all of said sum in petitioner's 1944 income and taxing said entire amount at the rates applicable for the year 1944 rather than at the rates applicable for the years 1938 and 1939.

(2) Respondent erroneously failed and refused to compute the tax upon said \$4,400.00 of income at the rates applicable for the years 1938 and 1939, to which years said income was attributable.

(3) The respondent erroneously determined that the provisions of Section 107 of the Internal Revenue Code are not applicable in the computation of petitioner's tax for the calendar year 1944 and erroneously failed and refused to apply said section in making such computation.

(4) The respondent erroneously computed the tax upon \$5,750.00, representing petitioner's community one-half of \$11,500.00 compensation for personal services paid to him and attributable to the years 1939 and 1940, upon the basis of including all of said sum in petitioner's 1945, income and taxing said entire amount at the rates applicable for the year 1945 rather than at the rates applicable for the years 1939 and 1940.

(5) Respondent erroneously failed and refused to compute the tax upon said \$5,750.00 of income at the rates applicable for the years 1939 and 1940, to which years said income was attributable.

(6) The respondent erroneously determined that the provisions of Section 107 of the Internal Revenue Code are not applicable in the computation of petitioner's tax for the calendar year 1945 and erroneously failed and refused to apply said section in making such computation.

V.

The facts upon which petitioner relies as a basis for this proceeding are as follows:

(1) During the years 1937 through 1945 and up to and including the present date, petitioner has been an officer of the Commodore Hotel Co., Ltd., 1203 West Seventh Street, Los Angeles, California. Said corporation keeps its books and files its income tax returns on the cash receipts and disbursements basis.

(2) By appropriate action of its board of directors, evidenced by proper corporate resolution, Commodore Hotel Co., Ltd., undertook and agreed to pay to petitioner monthly from and after January 1, 1937, a salary of \$600.00 per month, said salary to continue monthly without interruption.

(3) During each of the years 1938, 1939 and 1940, said corporation suffered deficits from its operations and its capital was impaired. It owed substantial amounts to outside creditors. Because of its straitened circumstances it was unable, during each of said years, to pay to petitioner the full amount of salary which it had been authorized by its board of directors to pay, and which it had agreed to pay. The corporation, however, at all times recognized its liability for the full amount authorized to be paid to petitioner.

(4) During the year 1944 said corporation first found itself in a financial position which would permit it to pay to petitioner a portion of the back salary theretofore unpaid. During said year it actually paid to petitioner the sum of \$8,800.00 on account of said back salary, which amount was attributable to the discharge, to the extent possible, of the unpaid salary of petitioner for the years 1938 and 1939.

(5) In preparing their federal income tax returns for the calendar year 1944 petitioner and his wife reported as community property the receipt of said \$8,800.00 and computed the tax thereon in

accordance with the provisions of Section 107(d) of the Internal Revenue Code. The respondent has refused to permit the application of said section of the Internal Revenue Code in the computation of petitioner's tax for said year.

(6) During the year 1945 said corporation paid to petitioner the sum of \$11,500.00 on account of said back salary, which amount was attributable to the discharge, to the extent possible, of petitioner's unpaid salary for the years 1939 and 1940.

(7) In preparing their federal income tax returns for the calendar year 1945 petitioner and his wife reported as community property the receipt of said \$11,500.00 and computed the tax thereon in accordance with the provisions of Section 107(d) of the Internal Revenue Code. The respondent has refused to permit the application of said section of the Internal Revenue Code in the computation of petitioner's tax for said year.

Wherefore, petitioner prays that this court may hear this proceeding and determine:

(1) That respondent erred in the particulars set forth in paragraph IV of this petition.

Respectfully submitted,

/s/ DANA LATHAM,

/s/ AUSTIN H. PECK, JR.,

/s/ HENRY C. DIEHL,

Counsel for Petitioner.

May 6, 1948

State of California,
County of Los Angeles—ss.

C. Abbott Lindsey, being first duly sworn, deposes and says: That he is the petitioner in the foregoing petition; that he has read said petition and is familiar with the facts contained therein, and that said facts are true and correct to the best of his knowledge and belief.

/s/ C. ABBOTT LINDSEY.

Subscribed and sworn to before me this 6th day of May, 1948.

[Seal] ISOBEL V. HUGHES,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Nov. 4, 1948.

EXHIBIT A

Form 1279 (Rev. Mar. 1946)

SN-IT-7

Treasury Department, Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

February 19, 1948

Office of
Internal Revenue Agent in Charge
Los Angeles Division
LA:IT:90D:LHP
Mr. C. Abbott Lindsey
1203 West Seventh Street
Los Angeles 14, California

Dear Mr. Lindsey:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1944 and 1945, discloses a deficiency of \$4,908.39, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are

requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA: Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,
GEO. J. SCHOENEMAN,
Commissioner,
By GEORGE D. MARTIN,
Internal Revenue Agent
in Charge.

Enclosures:
Statement
Form of waiver

Statement

LA:IT:90D:LHP

Mr. C. Abbott Lindsey
1203 West Seventh Street
Los Angeles 14, California

Tax Liability for the Taxable Years
Ended December 31, 1944 and 1945

Year	Deficiency
1944 Income tax	\$2,041.07
1945 Income tax	2,867.32
<hr/>	
Total	\$4,908.39

In making this determination of your income tax liability careful consideration has been given to the report of examination dated March 17, 1947.

Adjustment to Net Income

Taxable Year Ended December 31, 1944

Net income as disclosed by return.....\$21,841.76

Additional deduction:

(a) Standard deduction 250.00

Net income adjusted.....\$21,591.76

Explanation of Adjustment

(a) In your return you elect to take the standard deduction provided in section 23 (aa)(1) of the Internal Revenue Code, but claim only \$250.00 of the \$500.00 allowable. An additional deduction of \$250.00 is accordingly allowed.

In your return you disclose receipt in 1944 of compensation for personal services in the amount of \$4,400.00 (your community half of \$8,800.00) attributable to the years 1938 and 1939 which you include in gross income. However, in the computation of your tax this income is excluded and the tax attributable to such income, computed at the lower rates in effect for such prior years, is added to the amount computed without regard to such income, the total of which is reported as your income tax liability for 1944.

It has been determined that the provisions of section 107 of the Internal Revenue Code are not applicable, and that the aforementioned \$4,400.00 con-

stitutes income taxable at the rates in effect in the year received.

Computation of Alternative Tax
Taxable Year Ended December 31, 1944

Net income adjusted	\$21,591.76
Less: Excess of net long-term capital gain over net short-term capital loss.....	1,550.09
Ordinary net income	\$20,041.67
Less: Surtax exemption	500.00
Balance (surtax net income)	\$19,541.67
Surtax on \$19,541.67	7,017.09
Ordinary net income	\$20,041.67
Less: Normal tax exemption	500.00
Balance subject to normal tax	\$19,541.67
Normal tax (3 per cent of \$19,541.67)	586.25
Partial tax	\$ 7,603.34
Plus: 50 per cent of \$1,550.09	775.04
Alternative tax	\$ 8,378.38

Computation of Tax
Taxable Year Ended December 31, 1944

Net income adjusted	\$21,591.76
Less: Surtax exemption	500.00
Surtax net income	\$21,091.76
Surtax	\$ 7,871.39
Net income adjusted	\$21,591.76
Less: Normal-tax exemption	500.00
Net income subject to normal tax	\$21,091.76
Normal tax at 3%	632.75
Total normal tax and surtax	\$ 8,504.14
Alternative tax	\$ 8,378.38
Correct income tax liability	\$ 8,378.38
Income tax liability shown on return, account No. 9020900	6,337.31
Deficiency of income tax	\$ 2,041.07

Net Income

Taxable Year Ended December 31, 1945

The net income of \$25,746.91 disclosed in your return is accepted as correct.

In your return you disclose receipt in 1945 of compensation for personal services in the amount of \$5,750.00 (your community half of \$11,500.00) attributable to the years 1939 and 1940. In the computation of your tax this income is excluded and the tax attributable to such income, computed at the lower rates in effect for such prior years, is added to the amount computed without regard to such income, the total of which is reported as your income tax liability for 1945.

It has been determined that the provisions of section 107 of the Internal Revenue Code are not applicable, and that the aforementioned \$5,750.00 constitutes income taxable at the rates in effect in the year received.

Computation of Alternative Tax
Taxable Year Ended December 31, 1945

Net income	\$25,746.91
Less: Excess of net long-term capital gain over net short-term capital loss	4,610.63
Ordinary net income	\$21,136.28
Less: Surtax exemption	500.00
Balance (surtax net income)	\$20,636.28
Surtax on \$20,636.28	\$ 7,616.32
Ordinary net income	\$21,136.28
Less: Normal tax exemption	500.00
Balance subject to normal tax	\$20,636.28
Normal tax (3 per cent of \$20,636.28)	619.09
Partial tax	\$ 8,235.41
Plus: 50 per cent of \$4,610.63	2,305.31
Alternative tax	\$10,540.72

Computation of Tax
Taxable Year Ended December 31, 1945

Net income	\$25,746.91
Less: Surtax exemption	500.00
Surtax net income	\$25,246.91
Surtax	\$10,295.68
Net income	\$25,746.91
Less: Normal-tax exemption	500.00
Net income subject to normal tax	\$25,246.91
Normal tax at 3%	757.41
Total normal tax and surtax	\$11,053.09
Alternative tax	\$10,540.72
Correct income tax liability	\$10,540.72
Income tax liability shown on return, acct. No. 2381798	7,673.40
Deficiency of income tax	\$ 2,867.32

Received and filed T.C.U.S., May 11, 1948.

Served May 12, 1948.

[Title of Tax Court and Cause.]

Docket No. 18396

AMENDED PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:LHP) dated February 19, 1948, and as a basis of this proceeding alleges as follows:

I.

Petitioner is an individual residing at 1203 West Seventh Street, Los Angeles 14, California. Petitioner's income tax return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California.

II.

The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A," was mailed to petitioner on February 19, 1948.

III.

The taxes in controversy are federal income taxes for the calendar years 1944 and 1945, as follows:

1944	\$2,041.07
1945	2,867.32
<hr/>	
Total	\$4,908.39

IV.

The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) The respondent erroneously computed the tax upon \$5,000.00, representing petitioner's community one-half of \$10,000.00 compensation for personal services paid to him and attributable to the years 1937, 1938, and 1939, upon the basis of including all of said sum in petitioner's 1944 income and taxing said entire amount at the rates applicable for the year 1944 rather than at the rates applicable for the years 1937, 1938, and 1939.

(2) Respondent erroneously failed and refused to compute the tax upon said \$5,000.00 of income at the rates applicable for the years 1937, 1938, and 1939, to which years said income was attributable.

(3) The respondent erroneously determined that the provisions of Section 107 of the Internal Revenue Code are not applicable in the computation of petitioner's tax for the calendar year 1944 and erroneously failed and refused to apply said section in making such computation.

(4) The respondent erroneously computed the tax upon \$5,750.00, representing petitioner's community one-half of \$11,500.00 compensation for personal services paid to him and attributable to the years 1939 and 1940, upon the basis of including all of said sum in petitioner's 1945 income and taxing said entire amount at the rates applicable for the year 1945 rather than at the rates applicable for the years 1939 and 1940.

(5) Respondent erroneously failed and refused

to compute the tax upon said \$5,750.00 of income at the rates applicable for the years 1939 and 1940, to which years said income was attributable.

(6) The respondent erroneously determined that the provisions of Section 107 of the Internal Revenue Code are not applicable in the computation of petitioner's tax for the calendar year 1945 and erroneously failed and refused to apply said section in making such computation.

(7) The respondent erred in failing and refusing to determine that petitioner has overpaid his income taxes for the calendar year 1944.

V.

The facts upon which petitioner relies as a basis for this proceeding are as follows:

(1) During the years 1937 through 1945 and up to and including the present date, petitioner has been an officer of the Commodore Hotel Co., Ltd., 1203 West Seventh Street, Los Angeles, California. Said corporation keeps its books and files its income tax returns on the cash receipts and disbursements basis.

(2) By appropriate action of its board of directors, evidenced by proper corporate resolution, Commodore Hotel Co., Ltd., undertook and agreed to pay to petitioner monthly from and after January 1, 1937, a salary of \$600.00 per month, said salary to continue monthly without interruption.

(3) During each of the years 1937, 1938, 1939

and 1940, said corporation suffered deficits from its operations and its capital was impaired. It owed substantial amounts to outside creditors. Because of its straitened circumstances it was unable, during each of said years, to pay to petitioner the full amount of salary which it had been authorized by its board of directors to pay, and which it had agreed to pay. The corporation, however, at all times recognized its liability for the full amount authorized to be paid to petitioner.

(4) During the year 1944 said corporation first found itself in a financial position which would permit it to pay to petitioner a portion of the back salary theretofore unpaid. During said year it actually paid to petitioner the sum of \$10,000.00 on account of said back salary, which amount was attributable to the discharge, to the extent possible, of the unpaid salary of petitioner for the years 1937, 1938, and 1939.

(5) In preparing their federal income tax returns for the calendar year 1944 petitioner and his wife reported as community property the receipt of said \$10,000.00 and computed the tax thereon in accordance with the provisions of Section 107(d) of the Internal Revenue Code. The respondent has refused to permit the application of said section of the Internal Revenue Code in the computation of petitioner's tax for said year.

(6) During the year 1945 said corporation paid to petitioner the sum of \$11,500.00 on account of said back salary, which amount was attributable

to the discharge, to the extent possible, of petitioner's unpaid salary for the years 1939 and 1940.

(7) In preparing their federal income tax returns for the calendar year 1945 petitioner and his wife reported as community property the receipt of said \$11,500.00 and computed the tax thereon in accordance with the provisions of Section 107(d) of the Internal Revenue Code. The respondent has refused to permit the application of said section of the Internal Revenue Code in the computation of petitioner's tax for said year.

(8) Petitioner's income tax return for the calendar year 1944 disclosed a liability for taxes in the amount of \$6337.31, which amount was paid on or before March 15, 1945. Petitioner's correct tax liability for said year 1944 is \$5607.42. Petitioner has overpaid his 1944 income taxes in the amount of \$729.84, and refund of said amount is hereby claimed.

Wherefore, petitioner prays that this court may hear this proceeding and determine:

(1) That respondent erred in the particulars set forth in paragraph IV of this petition.

Respectfully submitted,

/s/ DANA LATHAM,

/s/ AUSTIN H. PECK, JR.,

/s/ HENRY C. DIEHL,

Counsel for Petitioner.

January 25, 1949.

State of California,
County of Los Angeles—ss.

C. Abbott Lindsey, being first duly sworn, deposes and says: That he is the petitioner in the foregoing petition; that he has read said petition and is familiar with the facts contained therein, and that said facts are true and correct to the best of his knowledge and belief.

s/ C. ABBOTT LINDSEY.

Subscribed and sworn to before me this 7th day of February, 1949.

[Seal] /s/ LILLIAN S. FOLTZ,
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT A

Form 1279 (Rev. Mar. 1946)

SN-IT-7

Treasury Department, Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

February 19, 1948.

Office of
Internal Revenue Agent in Charge
Los Angeles Division
LA:IT:90D:LHP
Mr. C. Abbott Lindsey
1203 West Seventh Street
Los Angeles 14, California

Dear Mr. Lindsey:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1944, and 1945, discloses a deficiency of \$4,908.39, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and for-

ward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA: Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,

Commissioner.

By GEORGE D. MARTIN,

Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form of waiver

Statement

LA:IT:90D:LHP

Mr. C. Abbott Lindsey

1203 West Seventh Street

Los Angeles 14, California

Tax Liability for the Taxable Years
Ended December 31, 1944, and 1945

Year	Deficiency
1944 Income Tax.....	\$2,041.07
1945 Income Tax.....	2,867.32
Total	<hr/> \$4,908.39

In making this determination of your income tax liability careful consideration has been given to the report of examination dated March 17, 1947.

Adjustment to Net Income

Taxable Year Ended December 31, 1944

Net income as disclosed by return.....\$21,841.76

Additional deduction:

(a) Standard deduction 250.00

Net income adjusted.....\$21,591.76

Explanation of Adjustment

(a) In your return you elect to take the standard deduction provided in section 23(aa)(1) of the Internal Revenue Code, but claim only \$250.00 of the \$500.00 allowable. An additional deduction of \$250.00 is accordingly allowed.

In your return you disclose receipt in 1944 of compensation for personal services in the amount of \$4,400.00 (your community half of \$8,800.00) attributable to the years 1938 and 1939 which you include in gross income. However, in the computation of your tax this income is excluded and the tax attributable to such income, computed at the lower rates in effect for such prior years, is added to the amount computed without regard to such income, the total of which is reported as your income tax liability for 1944.

It has been determined that the provisions of section 107 of the Internal Revenue Code are not applicable, and that the aforementioned \$4,400.00 con-

stitutes income taxable at the rates in effect in the year received.

Computation of Alternative Tax
Taxable Year Ended December 31, 1944

Net income adjusted	\$21,591.76
Less: Excess of net long-term capital gain over net short-term capital loss	1,550.09
Ordinary net income	\$20,041.67
Less: Surtax exemption	500.00
Balance (surtax net income)	\$19,541.67
Surtax on \$19,541.67	7,017.09
Ordinary net income	\$20,041.67
Less: Normal tax exemption	500.00
Balance subject to normal tax	\$19,541.67
Normal tax (3 per cent of \$19,541.67)	586.25
Partial tax	\$ 7,603.34
Plus: 50 per cent of \$1,550.09	775.04
Alternative tax	\$ 8,378.38

Computation of Tax
Taxable Year Ended December 31, 1944

Net income adjusted	\$21,591.76
Less: Surtax exemption	500.00
Surtax net income	\$21,091.76
Surtax	\$ 7,871.39
Net income adjusted	\$21,591.76
Less: Normal-tax exemption	500.00
Net income subject to normal tax	\$21,091.76
Normal tax at 3%	632.75
Total normal tax and surtax	\$ 8,504.14
Alternative tax	8,378.38
Correct income tax liability	\$ 8,378.38
Income tax liability shown on return account No. 9020900	6,337.31
Deficiency of income tax	\$ 2,041.07

Net Income

Taxable Year Ended December 31, 1945

The net income of \$25,746.91 disclosed in your return is accepted as correct.

In your return you disclose receipt in 1945 of compensation for personal services in the amount of \$5,750.00 (your community half of \$11,500.00) attributable to the years 1939 and 1940. In the computation of your tax this income is excluded and the tax attributable to such income, computed at the lower rates in effect for such prior years, is added to the amount computed without regard to such income, the total of which is reported as your income tax liability for 1945.

It has been determined that the provisions of section 107 of the Internal Revenue Code are not applicable, and that the aforementioned \$5,750.00 constitutes income taxable at the rates in effect in the year received.

Computation of Alternative Tax
Taxable Year Ended December 31, 1945

Net income	\$25,746.91
Less: Excess of net long-term capital gain over net short-term capital loss	4,610.63
Ordinary net income	\$21,136.28
Less: Surtax exemption	500.00
Balance (surtax net income)	\$20,636.28
Surtax on \$20,636.28	\$ 7,616.32
Ordinary net income	\$21,136.28
Less: Normal tax exemption	500.00
Balance subject to normal tax	\$20,636.28
Normal tax (3% of \$20,636.28)	619.09
Partial tax	\$ 8,235.41
Plus: 50% of \$4,610.63	2,305.31
Alternative tax	\$10,540.72

Computation of Tax
Taxable Year Ended December 31, 1945

Net income	\$25,746.91
Less: Surtax exemption	500.00
Surtax net income	\$25,246.91
Surtax	\$10,295.68
Net income	\$25,746.91
Less: Normal-tax exemption	500.00
Net income subject to normal tax	\$25,246.91
Normal tax at 3%	757.41
Total normal tax and surtax	\$11,053.09
Alternative tax	\$10,540.72
Correct income tax liability	\$10,540.72
Income tax liability shown on return account No. 2381798	7,673.40
Deficiency of income tax	\$ 2,867.32

Filed T.C.U.S. Feb. 9, 1949.

Served March 1, 1949.

The Tax Court of the United States

Docket No. 18397

PAULINE LINDSEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:LHP) dated February 19, 1948, and as a basis of this proceeding alleges as follows:

I.

Petitioner is an individual residing at 1203 West Seventh Street, Los Angeles 14, California. Petitioner's income tax return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California.

II.

The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A", was mailed to petitioner on February 19, 1948.

III.

The taxes in controversy are federal income taxes for the calendar years 1944 and 1945, as follows:

1944	\$2,041.07
1945	2,867.32
<hr/>	
Total	\$4,908.39

IV.

The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) The respondent erroneously computed the tax upon \$4,400.00 representing petitioner's community one-half of \$8,800.00 compensation for personal services paid to her husband and attributable to the years 1938 and 1939, upon the basis of including all of said sum in petitioner's 1944 income and taxing said entire amount at the rates applicable for the year 1944 rather than at the rates applicable for the years 1938 and 1939.

(2) Respondent erroneously failed and refused to compute the tax upon said \$4,400.00 income at the rates applicable for the years 1938 and 1939, to which years said income was attributable.

(3) The respondent erroneously determined that the provisions of Section 107 of the Internal Revenue Code are not applicable in the computation of petitioner's tax for the calendar year 1944 and erroneously failed and refused to apply said section in making such computation.

(4) The respondent erroneously computed the tax upon \$5,750.00, representing petitioner's community one-half of \$11,500.00 compensation for per-

sonal services paid to petitioner's husband and attributable to the years 1939 and 1940, upon the basis of including all of said sum in petitioner's 1945 income and taxing said entire amount at the rates applicable for the year 1945 rather than at the rates applicable for the years 1939 and 1940.

(5) Respondent erroneously failed and refused to compute the tax upon said \$5,750.00 of income at the rates applicable for the years 1939 and 1940, to which years said income was attributable.

(6) The respondent erroneously determined that the provisions of Section 107 of the Internal Revenue Code are not applicable in the computation of petitioner's tax for the calendar year 1945 and erroneously failed and refused to apply said section in making such computation.

V.

The facts upon which petitioner relies as a basis for this proceeding are as follows:

(1) During the years 1937 through 1945, and up to and including the present date, petitioner's husband has been an officer of the Commodore Hotel Co., Ltd., 1203 West Seventh Street, Los Angeles, California. Said corporation keeps its books and files its income tax returns on the cash receipts and disbursements basis.

(2) By appropriate action of its board of directors evidenced by proper corporate resolution, Commodore Hotel Co., Ltd., undertook and agreed to

pay to petitioner's husband monthly from and after January 1, 1937, a salary of \$600.00 per month, said salary to continue monthly without interruption.

(3) During each of the years 1938, 1939 and 1940, said corporation suffered deficits from its operations and its capital was impaired. It owed substantial amounts to outside creditors. Because of its straitened circumstances it was unable, during each of said years, to pay to petitioner's husband the full amount of salary which it had been authorized by its board of directors to pay, and which it had agreed to pay. The corporation, however, at all times recognized its liability for the full amount authorized to be paid to petitioner's husband.

(4) During the year 1944 said corporation first found itself in a financial position which would permit it to pay to petitioner's husband a portion of the back salary theretofore unpaid. During said year it actually paid to petitioner's husband the sum of \$8,800.00 on account of said back salary, which amount was attributable to the discharge, to the extent possible, of the unpaid salary of petitioner's husband for the years 1938 and 1939.

(5) In preparing their federal income tax returns for the calendar year 1944 petitioner and her husband reported as community property the receipt of said \$8,800.00 and computed the tax thereon in accordance with the provisions of Section 107(d) of the Internal Revenue Code. The respondent has

refused to permit the application of said section of the Internal Revenue Code in the computation of petitioner's tax for said year.

(6) During the year 1945 said corporation paid to petitioner's husband the sum of \$11,500.00 on account of said back salary, which amount was attributable to the discharge, to the extent possible, of petitioner's husband's unpaid salary for the years 1939 and 1940.

(7) In preparing their federal income tax returns for the calendar year 1945 petitioner and her husband reported as community property the receipt of said \$11,500.00 and computed the tax thereon in accordance with the provisions of Section 107 (d) of the Internal Revenue Code. The respondent has refused to permit the application of said section of the Internal Revenue Code in the computation of petitioner's tax for said year.

Wherefore, petitioner prays that this court may hear this proceeding and determine:

(1) That respondent erred in the particulars set forth in paragraph IV of this petition.

Respectfully submitted,

/s/ DANA LATHAM,

/s/ AUSTIN H. PECK, JR.,

/s/ HENRY C. DIEHL,

Counsel for Petitioner.

May 6, 1948.

State of California,
County of Los Angeles—ss.

Pauline Lindsey, being first duly sworn, deposes and says: That she is the petitioner in the foregoing petition; that she has read said petition and is familiar with the facts contained therein, and that said facts are true and correct to the best of her knowledge and belief.

/s/ PAULINE LINDSEY.

Subscribed and sworn to before me this 6th day of May, 1948.

[Seal] /s/ ISOBEL V. HUGHES,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Nov. 4, 1948.

EXHIBIT A

Form 1279 (Rev. Mar. 1946)

SN-IT-7

Treasury Department Internal Revenue Service

417 South Hill Street

Los Angeles 13, California

Feb. 19, 1948

Internal Revenue

Agent In Charge

Los Angeles Division

LA:IT:90D:LHP

Mrs. Pauline Lindsey

1203 West 7th Street

Los Angeles 14, California

Dear Mrs. Lindsey:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1944 and 1945 discloses a deficiency of \$4,908.39, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are

requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,

Commissioner,

By GEORGE D. MARTIN,

Internal Revenue Agent

in Charge.

Enclosures:

Statement

Form of waiver

Statement

LA:IT:90D:LHP

Mrs. Pauline Lindsey

1203 West 7th Street

Los Angeles 14, California

Tax Liability for the Taxable Years

Ended December 31, 1944 and 1945

Years	Deficiency
1944 Income Tax.....	\$2,041.07
1945 Income Tax.....	2,867.32

Total\$4,908.39

In making this determination of your income tax liability careful consideration has been given to the report of examination dated March 17, 1947.

Adjustment to Net Income

Taxable Year Ended December 31, 1944

Net income as disclosed by return.....\$21,841.76

Additional deduction:

(a) Standard deduction 250.00

Net income adjusted.....\$21,591.76

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It has been determined that the provisions of section 107 of the Internal Revenue Code are not

applicable, and that the aforementioned \$4,400.00 constitutes income taxable at the rates in effect in the year received.

Computation of Alternative Tax
Taxable Year Ended December 31, 1944

Net income adjusted	\$21,591.76
Less: Excess of net long-term capital gain over net short-term capital loss	1,550.08
Ordinary net income	\$20,041.68
Less: Surtax exemption	500.00
Balance (surtax net income)	\$19,541.68
Surtax on \$19,541.68	\$ 7,017.09
Ordinary net income	\$20,041.68
Less: Normal tax exemption	500.00
Balance subject to normal tax	\$19,541.68
Normal tax (3% of \$19,541.68)	586.25
Partial tax	\$ 7,603.34
Plus: 50% of \$1,550.08	775.04
Alternative tax	\$ 8,378.38

Computation of Tax
Taxable Year Ended December 31, 1944

Net income adjusted	\$21,591.76
Less: Surtax exemption	500.00
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Net income adjusted	\$21,591.76
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Normal tax at 3%	632.75
Total normal tax and surtax	\$ 8,504.14
Alternative tax	\$ 8,378.38
Correct income tax liability	\$ 8,378.38
Income tax liability shown on return, account No. 9020901	6,337.31
Deficiency of income tax	\$ 2,041.07

Net Income

Taxable Year Ended December 31, 1945

The net income of \$25,746.91 disclosed in your return is accepted as correct.

In your return you disclose receipt in 1945 of compensation for personal services in the amount of \$5,750.00 (your community half of \$11,500.00) attributable to the years 1939 and 1940. In the computation of your tax this income is excluded and the tax attributable to such income, computed at the lower rates in effect for such prior years, is added to the amount computed without regard to such income, the total of which is reported as your income tax liability for 1945.

It has been determined that the provisions of section 107 of the Internal Revenue Code are not applicable, and that the aforementioned \$5,750.00 constitutes income taxable at the rates in effect in the year received.

Computation of Alternative Tax
Taxable Year Ended December 31, 1945

Net Income	\$25,746.91
Less: Excess of net long-term capital gain over net short-term capital loss	4,610.63
Ordinary net income	\$21,136.28
Less: Surtax exemption	500.00
Balance (surtax net income)	\$20,636.28
Surtax on \$20,636.28	\$ 7,616.32
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Partial tax	\$ 8,235.41
Plus: 50 per cent of \$4,610.63	2,305.31
Alternative tax	\$10,540.72

Computation of Tax
Taxable Year Ended December 31, 1945

Net income	\$25,746.91
Less: Surtax exemption	500.00
Surtax net income	\$25,246.91
Surtax	\$10,295.68
Net income	\$25,746.91
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Normal tax at 3%	757.41
Total normal tax and surtax	\$11,053.09
Alternative tax	\$10,540.72
Correct income tax liability	\$10,540.72
Income tax liability shown on return, acct. No. 2381797	7,673.40
Deficiency of income tax	\$ 2,867.32

Received and filed T. C. U. S. May 11, 1949.

Served Mar. 12, 1949.

[Title of Tax Court and Cause.]

Docket No. 18397

AMENDED PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (LA:IT:90D:LHP) dated February 19, 1948, and as a basis of this proceeding alleges as follows:

I.

Petitioner is an individual residing at 1203 West Seventh Street, Los Angeles 14, California. Petitioner's income tax return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California.

II.

The notice of deficiency, a copy of which is attached hereto and marked Exhibit "A", was mailed to petitioner on February 19, 1948.

III.

The taxes in controversy are federal income taxes for the calendar years 1944 and 1945, as follows:

1944	\$2,041.07
1945	2,867.32

Total	\$4,908.39
-------------	------------

IV.

The determination of tax set forth in said notice of deficiency is based upon the following errors:

(1) The respondent erroneously computed the tax upon \$5,000.00 representing petitioner's community one-half of \$10,000.00 compensation for personal services paid to her husband and attributable to the years 1937, 1938, and 1939, upon the basis of including all of said sum in petitioner's 1944 income and taxing said entire amount at the rates applicable for the year 1944 rather than at the rates applicable for the years 1937, 1938 and 1939.

(2) Respondent erroneously failed and refused to compute the tax upon said \$5,000.00 income at the rates applicable for the years 1937, 1938 and 1939, to which years said income was attributable.

(3) The respondent erroneously determined that the provisions of Section 107 of the Internal Revenue Code are not applicable in the computation of petitioner's tax for the calendar year 1944 and erroneously failed and refused to apply said section in making such computation.

(4) The respondent erroneously computed the tax upon \$5,750.00, representing petitioner's community one-half of \$11,500.00 compensation for personal services paid to petitioner's husband and attributable to the years 1939 and 1940, upon the basis of including all of said sum in petitioner's 1945 income and taxing said entire amount at the rates

applicable for the year 1945 rather than at the rates applicable for the years 1939 and 1940.

(5) Respondent erroneously failed and refused to compute the tax upon said \$5,750.00 of income at the rates applicable for the years 1939 and 1940, to which years said income was attributable.

(6) The respondent erroneously determined that the provisions of Section 107 of the Internal Revenue Code are not applicable in the computation of petitioner's tax for the calendar year 1945 and erroneously failed and refused to apply said section in making such computation.

(7) The respondent erred in failing and refusing to determine that petitioner has overpaid her income taxes for the calendar year 1944.

V.

The facts upon which petitioner relies as a basis for this proceeding are as follows:

(1) During the years 1937 through 1945, and up to and including the present date, petitioner's husband has been an officer of the Commodore Hotel Co., Ltd., 1203 West Seventh Street, Los Angeles, California. Said corporation keeps its books and files its income tax returns on the cash receipts and disbursements basis.

(2) By appropriate action of its board of directors evidenced by proper corporate resolution, Commodore Hotel Co., Ltd., undertook and agreed to pay

to petitioner's husband monthly from and after January 1, 1937, a salary of \$600.00 per month, said salary to continue monthly without interruption.

(3) During each of the years 1937, 1938, 1939, and 1940, said corporation suffered deficits from its operations and its capital was impaired. It owed substantial amounts to outside creditors. Because of its straitened circumstances it was unable, during each of said years, to pay to petitioner's husband the full amount of salary which it had been authorized by its board of directors to pay, and which it had agreed to pay. The corporation, however, at all times recognized its liability for the full amount authorized to be paid to petitioner's husband.

(4) During the year 1944 said corporation first found itself in a financial position which would permit it to pay to petitioner's husband a portion of the back salary theretofore unpaid. During said year it actually paid to petitioner's husband the sum of \$10,000.00 on account of said back salary, which amount was attributable to the discharge, to the extent possible, of the unpaid salary of petitioner's husband for the years 1937, 1938, and 1939.

(5) In preparing their federal income tax returns for the calendar year 1944 petitioner and her husband reported as community property the receipt of said \$10,000.00 and computed the tax thereon in accordance with the provisions of Section 107(d) of the Internal Revenue Code. The respondent has

refused to permit the application of said section of the Internal Revenue Code in the computation of petitioner's tax for said year.

(6) During the year 1945 said corporation paid to petitioner's husband the sum of \$11,500.00 on account of said back salary, which amount was attributable to the discharge, to the extent possible, of petitioner's husband's unpaid salary for the years 1939 and 1940.

(7) In preparing their federal income tax returns for the calendar year 1945 petitioner and her husband reported as community property the receipt of said \$11,500.00 and computed the tax thereon in accordance with the provisions of Section 107(d) of the Internal Revenue Code. The respondent has refused to permit the application of said section of the Internal Revenue Code in the computation of petitioner's tax for said year.

(8) Petitioner's income tax return for the calendar year 1944 disclosed a liability for taxes in the amount of \$6,337.31, which amount was paid on or before March 15, 1945. Petitioner's correct tax liability for said year 1944 is \$5,607.42. Petitioner has overpaid her 1944 income taxes in the amount of \$729.84, and refund of said amount is hereby claimed.

Wherefore, petitioner prays that this court may hear this proceeding and determine:

(1) That respondent erred in the particulars set forth in paragraph IV of this petition.

Respectfully submitted,

/s/ DANA LATHAM,

/s/ AUSTIN H. PECK, JR.,

/s/ HENRY C. DIEHL,

Counsel for Petitioner.

January 25, 1949.

State of California,

County of Los Angeles—ss.

Pauline Lindsey, being first duly sworn deposes and says: That she is the petitioner in the foregoing petition; that she has read said petition and is familiar with the facts contained therein, and that said facts are true and correct to the best of her knowledge and belief.

/s/ PAULINE I. LINDSEY.

Subscribed and sworn to before me this 7 day of February, 1949.

[Seal] /s/ LILLIAN S. FOLTZ,
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT A

Form 1279 (Rev. Mar. 1946)

SN-IT-7

Treasury Department, Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

Feb. 19, 1948

Internal Revenue
Agent in Charge
Los Angeles Division
LA:IT:90D:LHP
Mrs. Pauline Lindsey
1203 West 7th Street
Los Angeles 14, California

Dear Mrs. Lindsey:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1944 and 1945 discloses a deficiency of \$4.908.39, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are

requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California for the attention of LA: Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,

Commissioner,

By GEORGE D. MARTIN,

Internal Revenue Agent

in Charge.

Enclosures:

Statement

Form of waiver

Statement

LA:IT:90D:LHP

Mrs. Pauline Lindsey

1203 West 7th Street

Los Angeles 14, California

Tax Liability for the Taxable Years

Ended December 31, 1944 and 1945

Years	Deficiency
1944 Income Tax.....	\$2,041.07
1945 Income Tax.....	2,867.32
Total	<hr/> \$4,908.39

In making this determination of your income tax liability careful consideration has been given to the report of examination dated March 17, 1947.

Adjustment to Net Income

Taxable Year Ended December 31, 1944

Net income as disclosed by return . . . \$21,841.76

Additional deduction:

(a) Standard deduction 250.00

Net income adjusted \$21,591.76

Explanation of Adjustment

(a) In your return you elect to take the standard deduction provided in section 23(aa)(1) of the Internal Revenue Code, but claim only \$250.00 of the \$500.00 allowable. An additional deduction of \$250.00 is accordingly allowed.

In your return you disclose receipt in 1944 of compensation for personal services in the amount of \$4,400.00 (your community half of \$8,800.00) attributable to the years 1938 and 1939 which you include in gross income. However, in the computation of your tax this income is excluded and the tax attributable to such income, computed at the lower rates in effect for such prior years, is added to the amount computed without regard to such income, the total of which is reported as your income tax liability for 1944.

It has been determined that the provisions of section 107 of the Internal Revenue Code are not

applicable, and that the aforementioned \$4,400.00 constitutes income taxable at the rates in effect in the year received.

Computation of Alternative Tax
Taxable Year Ended December 31, 1944

Net income adjusted	\$21,591.76
Less: Excess of net long-term capital gain over net short-term capital loss	1,550.08
Ordinary net income	\$20,041.68
Less: Surtax exemption	500.00
Balance (surtax net income)	\$19,541.68
Surtax on \$19,541.68	\$ 7,017.09
Ordinary net income	\$20,041.68
Less: Normal tax exemption	500.00
Balance subject to normal tax	\$19,541.68
Normal tax (3% of \$19,541.68)	586.25
Partial tax	\$ 7,603.34
Plus: 50% of \$1,550.08	775.04
Alternative tax	\$ 8,378.38

Computation of Tax
Taxable Year Ended December 31, 1944

Net income adjusted	\$21,591.76
Less: Surtax exemption	500.00
Surtax net income	\$21,091.76
Surtax	\$ 7,871.39
Net income adjusted	\$21,591.76
Less: Normal-tax exemption	500.00
Net income subject to normal tax	\$21,091.76
Normal tax at 3%	632.75
Total normal tax and surtax	\$ 8,504.14
Alternative tax	\$ 8,378.38
Correct income tax liability	\$ 8,378.38
Income tax liability shown on return, account No. 9020901	6,337.31
Deficiency of income tax	\$ 2,041.07

Net Income

Taxable Year Ended December 31, 1945

The net income of \$25,746.91 disclosed in your return is accepted as correct.

In your return you disclose receipt in 1945 of compensation for personal services in the amount of \$5,750.00 (your community half of \$11,500.00) attributable to the years 1939 and 1940. In the computation of your tax this income is excluded and the tax attributable to such income, computed at the lower rates in effect for such prior years, is added to the amount computed without regard to such income, the total of which is reported as your income tax liability for 1945.

It has been determined that the provisions of section 107 of the Internal Revenue Code are not applicable, and that the aforementioned \$5,750.00 constitutes income taxable at the rates in effect in the year received.

Computation of Alternative Tax
Taxable Year Ended December 31, 1945

Net income	\$25,746.91
Less: Excess of net long-term capital gain over net short-term capital loss	4,610.63
Ordinary net income	\$21,136.28
Less: Surtax exemption	500.00
Balance (surtax net income)	\$20,636.28
Surtax on \$20,636.28	\$ 7,616.32
Ordinary net income	\$21,136.28
Less: Normal tax exemption	500.00
Balance subject to normal tax	\$20,636.28
Normal tax (3% of \$20,636.28)	619.09
Partial tax	\$ 8,235.41
Plus: 50% of \$4,610.63	2,305.31
Alternative tax	\$10,540.72

Computation of Tax
Taxable Year Ended December 31, 1945

Net income	\$25,746.91
Less: Surtax exemption	500.00
Surtax net income	\$25,246.91
Surtax	\$10,295.68
Net income	\$25,746.91
Less: Normal-tax exemption	500.00
Net income subject to normal tax	\$25,246.91
Normal tax at 3%	757.41
Total normal tax and surtax	\$11,053.09
Alternative tax	\$10,540.72
Correct income tax liability	\$10,540.72
Income tax liability shown on return, account No. 2381797	7,673.40
Deficiency of income tax	\$ 2,867.32

Filed U.S.T.C. Feb. 9, 1949.

Served Mar. 1, 1949.

The Tax Court of the United States

Docket No. 16756

R. L. LANGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

I. & II.

Admits the allegations contained in paragraphs I & II of the petition.

III.

Admits that the taxes in controversy are income taxes for the calendar year 1944. Denies the remainder of the allegations contained in paragraph III of the petition.

IV.

Denies the allegations of error contained in paragraph IV of the petition.

V.

(1) to (4) inclusive. Denies the allegations contained in sub-paragraphs (1) to (4) inclusive of paragraph V of the petition.

(5) Admits the allegations contained in sub-paragraph (5) of paragraph V of the petition.

VI.

Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner of Internal Revenue be approved.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,
Special Attorney,
Bureau of Internal Revenue.

Received and filed U.S.T.C. Jan. 26, 1948.

The Tax Court of the United States

Docket No. 16757

ELEANORE LANGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

I. & II.

Admits the allegations contained in paragraphs I and II of the petition.

III.

Admits that the taxes in controversy are income taxes for the calendar year 1944. Denies the remainder of the allegations contained in paragraph III of the petition.

IV.

Denies the allegations of error contained in paragraph IV of the petition.

V.

(1) to (4) inclusive. Denies the allegations contained in sub-paragraphs (1) to (4) inclusive of paragraph V of the petition.

(5) Admits the allegations contained in sub-paragraph (5) of paragraph V of the petition.

VI.

Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner of Internal Revenue be approved.

/s/ CHARLES OLIPHANT,

ECC

Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,
Special Attorney,
Bureau of Internal Revenue.

Received and filed Jan. 26, 1948.

The Tax Court of the United States

Docket No. 18396

C. ABBOTT LINDSEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I. and II.

Admits the allegations contained in paragraphs I and II of the petition.

III.

Admits that the taxes in controversy are Federal income taxes for the calendar years 1944 and 1945; denies the remainder of the allegations contained in paragraph III of the petition.

IV.

(1) to (6), inclusive. Denies the allegations of error contained in subparagraphs (1) to (6), inclusive, of paragraph IV of the petition.

V.

(1) For lack of sufficient information as to the truth or correctness thereof denies the allegations contained in subparagraph (1) of paragraph V of the petition.

(2) and (3) Denies the allegations contained in subparagraphs (2) and (3) of paragraph V of the petition.

(4) Admits that during the year 1944 said corporation paid to the petitioner the sum of \$8,800.00; denies the remainder of the allegations contained in subparagraph (4) of paragraph V of the petition.

5) Admits that in preparing their Federal income tax returns for the calendar year 1944 petitioner and his wife reported as community property the receipt of said \$8,800. Further admits that respondent has held Section 107(d) of the Internal Revenue Code inapplicable in the computation of petitioner's tax for said year. Denies the remainder of the allegations contained in subparagraph (5) of paragraph V of the petition.

(6) Admits that during the year 1945 said corporation paid to the petitioner the sum of \$11,500; denies the remainder of the allegations contained in subparagraph (6) of paragraph V of the petition.

(7) Admits that in preparing their Federal income tax returns for the calendar year 1945, petitioner and his wife reported as community property the receipt of said \$11,500. Further admits

that respondent has held Section 107(d) of the Internal Revenue Code inapplicable in the computation of petitioner's tax for said year. Denies the remainder of the allegations contained in subparagraph (7) of paragraph V of the petition.

VI. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT,
ECC,
Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
E. C. CROUTER,
A. J. HURLEY,
Special Attorneys,
Bureau of Internal Revenue.

[Title of Tax Court and Cause.]

Docket No. 18396

ANSWER TO AMENDED PETITION

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the amended

petition of the above-named taxpayer, admits and denies as follows:

I and II. Admits the allegations contained in paragraphs I and II of the amended petition.

III. Admits that the taxes in controversy are Federal income taxes for the calendar years 1944 and 1945. Denies the remainder of the allegations contained in paragraph III of the amended petition.

IV. (1) to (7) inclusive. Denies the allegations of error contained in subparagraphs (1) to (7) inclusive of paragraph IV of the amended petition.

V. (1). Admits the allegations contained in subparagraph (1) of paragraph V of the amended petition.

(2). Admits that on April 14, 1937, the board of directors of Commodore Hotel Co., Ltd., authorized the payment of salary to petitioner in the amount of \$600.00 per month commencing as of January 1, 1937. Denies the remainder of the allegations contained in subparagraph (2) of paragraph V of the amended petition.

(3). Admits that during each of the years 1937, 1938, 1939 and 1940, said corporation suffered deficits from operations and in its capital account. Denies the remainder of the allegations contained in subparagraph (3) of paragraph V of the amended petition.

(4). Admits that during the year 1944 said corporation paid to the petitioner the sum of \$10,000.00. Denies the remainder of the allegations contained in subparagraph (4) of paragraph V of the amended petition.

(5). Admits that in preparing their Federal income tax returns for the calendar year 1944 petitioner and his wife reported as community property the receipt of said \$10,000.00; further admits that respondent has held Section 107(d) of the Internal Revenue Code inapplicable in the computation of petitioner's tax for said year. Denies the remainder of the allegations contained in subparagraph (5) of paragraph V of the amended petition.

(6). Admits that during the year 1945 said corporation paid to the petitioner the sum of \$11,500.00. Denies the remainder of the allegations contained in subparagraph (6) of paragraph V of the amended petition.

(7). Admits that in preparing their Federal income tax returns for the calendar year 1945 petitioner and his wife reported as community property the receipt of said \$11,500.00; further admits that respondent has held Section 107(d) of the Internal Revenue Code inapplicable in the computation of petitioner's tax for said year. Denies the remainder

of the allegations contained in subparagraph (7) of paragraph V of the amended petition.

(8). Admits that the amount of liability for taxes shown by petitioner on his income tax return for the calendar year 1944 was \$6,337.31. Denies the remainder of the allegations contained in subparagraph (8) of paragraph V of the amended petition.

VI. Denies each and every allegation contained in the amended petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT,

E.C.C.

Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,

L. C. AARONS,

Special Attorneys,

Bureau of Internal Revenue.

Filed T.C.U.S. Feb. 14, 1949.

The Tax Court of the United States

Docket No. 18397

PAULINE LINDSEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I and II.

Admits the allegations contained in paragraphs I and II of the petition.

III.

Admits that the taxes in controversy are Federal income taxes for the calendar years 1944 and 1945; denies the remainder of the allegations contained in paragraph III of the petition.

IV.

(1) to (6), inclusive. Denies the allegations of error contained in subparagraphs (1) to (6), inclusive, of paragraph IV of the petition.

V.

(1). For lack of sufficient information as to the truth or correctness thereof denies the allegations contained in subparagraph (1) of paragraph V of the petition.

(2) and (3). Denies the allegations contained in subparagraphs (2) and (3) of paragraph V of the petition.

(4). Admits that during the year 1944 said corporation paid to petitioner's husband the sum of \$8,800.00; denies the remainder of the allegations contained in subparagraph (4) of paragraph V of the petition.

(5). Admits that in preparing their Federal income tax returns for the calendar year 1944 petitioner and her husband reported as community property the receipt of said \$8,800. Further admits that respondent has held Section 107(d) of the Internal Revenue Code inapplicable in the computation of petitioner's tax for said year. Denies the remainder of the allegations contained in subparagraph (5) of paragraph V of the petition.

(6). Admits that during the year 1945 said corporation paid to petitioner's husband the sum of \$11,500; denies the remainder of the allegations

contained in subparagraph (6) of paragraph V of the petition.

(7). Admits that in preparing their Federal income tax returns for the calendar year 1945, petitioner and her husband reported as community property the receipt of said \$11,500. Further admits that respondent has held Section 107(d) of the Internal Revenue Code inapplicable in the computation of petitioner's tax for said year. Denies the remainder of the allegations contained in subparagraph (7) of paragraph V of the petition.

VI. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT,

E.C.C.

Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,

A. J. HURLEY,

Special Attorneys,

Bureau of Internal Revenue.

Received and filed June 22, 1948.

[Title of Tax Court and Cause.]

Docket No. 18397

ANSWER TO AMENDED PETITION

The Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, for answer to the amended petition of the above-named taxpayer, admits and denies as follows:

I and II. Admits the allegations contained in paragraphs I and II of the amended petition.

III. Admits that the taxes in controversy are Federal income taxes for the calendar years 1944 and 1945. Denies the remainder of the allegations contained in paragraph III of the amended petition.

IV. (1) to (7) inclusive. Denies the allegations of error contained in subparagraphs (1) to (7) inclusive of paragraph IV of the amended petition.

V. (1). Admits the allegations contained in subparagraph (1) of paragraph V of the amended petition.

(2). Admits that on April 14, 1937, the board of directors of Commodore Hotel Co., Ltd., authorized the payment of salary to petitioner's husband in the amount of \$600.00 per month commencing as of January 1, 1937. Denies the remain-

der of the allegations contained in subparagraph (2) of paragraph V of the amended petition.

(3). Admits that during each of the years 1937, 1938, 1939 and 1940, said corporation suffered deficits from operations and in its capital account. Denies the remainder of the allegations contained in subparagraph (3) of paragraph V of the amended petition.

(4). Admits that during the year 1944 said corporation paid to petitioner's husband the sum of \$10,000.00. Denies the remainder of the allegations contained in subparagraph (4) of paragraph V of the amended petition.

(5). Admits that in preparing their Federal income tax returns for the calendar year 1944 petitioner and her husband reported as community property the receipt of said \$10,000.00; further admits that respondent has held Section 107(d) of the Internal Revenue Code inapplicable in the computation of petitioner's tax for said year. Denies the remainder of the allegations contained in subparagraph (5) of paragraph V of the amended petition.

(6). Admits that during the year 1945 said corporation paid to petitioner's husband the sum of \$11,500.00. Denies the remainder of the allegations contained in subparagraph (6) of paragraph V of the amended petition.

(7). Admits that in preparing their Federal income tax returns for the calendar year 1945 peti-

tioner and her husband reported as community property the receipt of said \$11,500.00; further admits that respondent has held Section 107(d) of the Internal Revenue Code inapplicable in the computation of petitioner's tax for said year. Denies the remainder of the allegations contained in subparagraph (7) of paragraph V of the amended petition.

(8). Admits that the amount of liability for taxes shown by petitioner on her income tax return for the calendar year 1944 was \$6,337.31. Denies the remainder of the allegations contained in subparagraph (8) of paragraph V of the amended petition.

VI. Denies each and every allegation contained in the amended petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT,

E.C.C.

Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,

L. C. AARONS,

Special Attorneys,

Bureau of Internal Revenue.

Filed T.C.U.S. Feb. 19, 1948.

ORDER CONSOLIDATING THE CASES
FOR TRIAL AND DECISIONMinutes of Proceedings The Tax Court
of the United States

Docket Nos. 16756, 16757, 18396, 18397

Date February 9, 1949.

Place: Los Angeles, Calif.

Proceeding: Estate of R. L. Langer, Deceased,
et al.

Assigned to: Judge Johnson.

* * *

On the merits Yes. Oral motion of petitioner's counsel, proceedings were ordered consolidated. Petitioners in Docket Nos. 18396 and 18397, on oral motion were granted permission to file amended petitions. Respondent also granted time, on oral motion, to file amended answers.

Ordered: Submitted.

* * *

/s/ NELLIE A. LINDLEY,
Acting Deputy Clerk.

13 T.C. No. 59

The Tax Court of the United States

Docket Nos. 16756, 16757, 18396, 18397.

ESTATE OF R. L. LANGER, deceased, ELEA-
NORE LANGER, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ELEANORE LANGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C. ABBOTT LINDSEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PAULINE LINDSEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated September 29, 1949.

FINDINGS OF FACT AND OPINION OF THE TAX COURT

1. An insolvent corporation, wholly owned by its officers and their families, was in default in the payment of a note secured by deed of trust on its principal asset, a hotel, and after procuring advances for taxes and payment concessions from the creditor in 1937 and again in 1941, it paid no salaries to its officer-stockholders until after first realizing an operating profit in 1942.

The deferment in salary payment, held, on the evidence not due to an event similar in nature to a receivership within the meaning of section 107(d) (2)(A)(iv), Internal Revenue Code, there being no legally enforceable control of the corporation in any one other than its own officers. *Norbert J. Kenny*, 4 T.C. 750, distinguished.

Austin H. Peck, Jr., Esq., for the petitioners.

L. C. Aarons, Esq., for the respondent.

The Commissioner determined the following deficiencies in petitioners' income taxes:

Docket No.	Petitioner	1944	1945
16756	R. L. Langer	\$3,086.48	\$.....
16757	Eleanore Langer	3,099.06
18396	C. Abbott Lindsey	2,041.07	2,867.32
18397	Pauline Lindsey	2,041.07	2,867.32

In so doing, he included in income taxable at current rates amounts received by R. L. Langer and C. Abbott Lindsey as back salary for prior years and reported by them and their wives, the other peti-

tioners, as community income taxable at the prior years' rates under the provisions of section 107(d), Internal Revenue Code. Respondent contends that the section is not applicable because (1) the deferment in payment was not caused by an event similar to receivership; (2) the employer was under no obligation to pay in prior years, and (3) the payments were less than 15 per cent of petitioners' gross incomes which should be computed to comprise receipts undiminished by the expenses of businesses from which they derived income. Petitioners reported and defend the inclusion of net profit from such businesses.

The proceedings were submitted upon a stipulation and exhibits, which we incorporate by reference as findings of fact, and oral testimony.

Findings of Fact

R. L. Langer, deceased, and his widow, Eleanore Langer, petitioner in Docket No. 16757, resided in 1944 at Los Angeles, California, and filed separate income tax returns for 1944 with the collector of internal revenue for the sixth district of California. Langer died on July 6, 1948; his widow was appointed executrix of his estate, and as such was substituted for him as petitioner in Docket No. 16756. C. Abbott Lindsey and his wife, Pauline Lindsey, petitioners in Docket Nos. 18396 and 18397, reside at Los Angeles, California, and filed separate income tax returns for 1944 and 1945 with the same collector. All the returns were prepared on the basis of cash receipts and disbursements.

Langer and family and Lindsey and family each owned one-half of the single class of outstanding stock of the Commodore Hotel Co., a California corporation. This corporation owned and operated the Commodore Hotel in Los Angeles; kept its accounts and filed its income tax returns on the basis of cash receipts and disbursements. Langer was president and Lindsey secretary, and by resolution of April 14, 1937, the board of directors, which included Langer and Lindsey, voted that a salary of \$600 a month be paid to each from January 1, 1937, and "every month hereafter." Pursuant to this resolution there was paid to each a total of \$4,800 during 1937, but the corporation fell into financial difficulties and no further payments were made until 1942 or 1943. From 1933 until 1942 the corporation each year sustained operating losses, which reached a maximum of \$14,724.74 in 1939, and its balance sheets constantly indicated a deficit until 1946, reaching a maximum of \$63,867.69 in 1941.

In 1933 the corporation had placed a deed of trust on its hotel building and a chattel mortgage on the furnishings, its principal assets, to secure its 6 per cent note for \$241,581, payable in monthly installments of \$2,000. By 1937 it was not only delinquent in the payment of interest on this note to the extent of \$13,419, but the creditor had advanced funds for taxes on the hotel. On January 16, 1937, an agreement was reached with the then holder of the note, Pacific Mutual Life Insurance Co. (hereafter called

Pacific) whereby the corporation agreed to pay off the total due of \$255,000 with interest over a ten-year period in monthly installments beginning at \$500 and increasing to \$1,250. The corporation made the required payments with some slight delays until June 30, 1939, but Pacific had to make further advances for taxes, and by the end of August, 1941, the amount due the creditor had only been reduced to \$240,750. On September 16, 1941, Pacific and the corporation entered into a new agreement, reducing the interest on the balance to 5 per cent and extending the payment period to 1956. The corporation agreed to make a fixed monthly payment of \$1,400 and to pay 50 per cent of its net income to Pacific within 30 days of the end of each year. Net income for this purpose was defined as gross income less \$5,000, operating expenses "including usual and reasonable management charges," upkeep costs, taxes, interest and the principal payments on a second note for \$2,592.62 which the corporation gave to Pacific. This second note was paid off in 1942, and payments have since been made on the principal indebtedness substantially as required. Pacific refrained from foreclosing on the hotel because its officers felt that the corporation's properties were being capably and honestly handled and that Langer and Lindsey would ultimately work out their difficulties.

At a directors' meeting held January 2, 1942, Langer, the president, brought up the subject of officers' salaries, "adjusted at \$600 a month" but not "paid since the year 1937," and the repayment

of a \$2,000 loan which he and Lindsey had each made to the corporation. Payment of the salaries and loans were authorized "as soon as there is sufficient net money available," and in the event of nonpayment of the salaries, authority was voted the officers "to execute the Corporation's promissory note to pay said sums at a later date * * * when the assets of the Corporation will permit." On January 2, 1943, the directors resolved that the salary of the president and of the secretary "be again set at \$600.00 per month for the current year of 1943," and salaries of \$7,200 were paid to each of them in that year.

After the corporation realized an operating income of \$9,755.23 in 1942 and of \$24,666.17 in 1943, the board of directors on January 3, 1944, mentioning that some salary payments were made in 1942, authorized the payment of back salaries to the officers, and recognized that there was owing to each \$1,200 for 1937 (\$2,400, as later corrected); \$7,200 for each of the years 1938, 1939, 1940, 1941, and \$3,900 for 1942. They then resolved that the corporation: * * * pay all said back salaries to the respective officers * * * as soon as it is able to do so.

Pursuant to this resolution the corporation paid \$17,200 to Langer and \$17,200 to Lindsey in 1944 and \$18,700 to Lindsey in 1945. Of the 1944 payments \$10,000 to each was on account of back salary; of the 1945 payments \$11,500 was on account of back salary to Lindsey. Near the close of 1944 the direc-

tors instructed Langer to address to the Salary Stabilization Unit of Treasury a letter requesting permission to pay officers' salaries for prior years. In the letter it was stated that "salaries for all years were authorized" but payments had been irregular because:

* * * the corporation, on a "cash basis," suffered losses for most of the years in question, and did not have the necessary cash available for salary payments.

The Salary Stabilization Unit replied that payment of back salaries did not require its approval "provided there was a bona fide contractual liability on October 3, 1942."

At a directors' meeting held January 5, 1945, Langer, as president, stated that:

* * * \$10,000 had been paid to each of the respective officers in 1944 as back salaries applied as follows, to-wit: \$2400 as owing for the year 1937; \$7200 as owing for the year 1938, and \$400 as part payment and owing for the year 1939, * * *.

At a directors' meeting held December 5, 1945, the president was specifically authorized to pay \$3,000 of surplus on account of officers' back salaries.

On their separate income tax returns for 1944 Langer and wife and Lindsey and wife each reported \$5,000 as the community share of the \$10,000 paid as back salary to each husband in 1944, and each computed a tax on this share by reference to

rates applicable to years for which the salary was paid, invoking the benefits of section 107(d), Internal Revenue Code. Among items of gross income Langer and wife each reported \$15,610.36, set forth in Schedule C as "Profit from Business or Profession." As explained in the schedule, they owned a half interest in the Clifton and Figueroa Hotels. From total receipts of \$22,311.71 of the Clifton Hotel they subtracted "business expenses" under itemized headings of Schedule C and arrived at a "net profit" of \$14,498.01, of which one-half, or \$7,249, was treated as their community income. Each included a half of the latter figure, or \$3,624.50, in gross income, item 4, of the individual return in arriving at the total gross income from which they subtracted the statutory deductions. In like manner they reported total receipts of \$271,987.99 of the Figueroa Hotel, deducted business expenses and arrived at a net community profit of \$31,220.71, of which each included a half, or \$15,610.35, in item 4 of gross income. Total gross income for 1944, as reported by Langer, was \$30,729.45; as reported by his wife, \$31,854.43.

On their income tax returns for 1945 Lindsey and wife each reported one-half of the \$11,500 received by Lindsey as back salary in 1945, and each computed a tax on that by reference to section 107(d), attributing \$6,800 to 1939 and \$4,700 to 1940. Each reported on the 1944 return \$23,667.65 as an item of gross income, set forth in Schedule C as "Profit

from Business or Profession.” As explained in the schedule they operated the Commodore Cafe from which each reported total receipts of \$131,547.39, cost of goods sold \$50,493.85, other business deductions \$57,385.88, resulting in a net profit of the \$23,667.65, which each included in gross income. For 1945 each similarly computed and included in gross income a net profit of \$20,421.44 from operation of the cafe. (Apparently the receipts, costs and expenses reported by each was a half of the business gross.)

As to each petitioner the Commissioner determined that section 107(d) was not applicable, and adding the amounts received as back salary to other income reported, he recomputed the tax at the rates in effect for the year of receipt.

Opinion

Johnson, Judge:

Under the view that Langer and Lindsey each received the \$10,000 paid in 1944 and that Lindsey received the \$11,500 paid in 1945 as back salary attributable to prior years' services, petitioners claim the benefit of section 107(d), which provides:

(1) In General.—If the amount of the back pay received or accrued by an individual during the taxable year exceeds 15 per centum of the gross income of the individual for such year, the part of the tax attributable to the inclusion of such back pay in gross income for the taxable year shall not

be greater than the aggregate of the increases in the taxes which would have resulted from the inclusion of the respective portions of such back pay in gross income for the taxable years to which such portions are respectively attributable, as determined under the regulations prescribed by the Commissioner with the approval of the Secretary.

Section 107(d)(2) defines "back pay" as:

* * * (A) remuneration, including wages, salaries * * * received or accrued during the taxable year by an employee for services performed prior to the taxable year for his employer and which would have been paid prior to the taxable year except for the intervention of one of the following events: (i) bankruptcy or receivership of the employer; (ii) dispute as to the liability * * *; (iii) if the employer is the United States, a State * * *, lack of funds appropriated to pay such remuneration; or (iv) any other event determined to be similar in nature under regulations prescribed by the Commissioner with the approval of the Secretary; * * *.

Petitioners contend that the corporation would have paid the salaries in the years when the services were rendered except for the intervention of an event similar in nature to bankruptcy or receivership. They argue that the corporation's continued operation of the hotel was by Pacific's suffrance; that if salaries had been paid to the officer-stockholders, that suffrance would have ceased as Pacific kept close watch over the corporation's affairs for protection of

its loan, even advancing funds needed for taxes. Admitting that no specific agreement forbade the payment of salaries to officers, they assert that any such payment, made in the corporation's precarious financial condition, would have invited foreclosure by the creditor. Respondent stresses the absence of any contractual or legal restriction on payment, and argues that a straitened financial condition is not similar in nature to bankruptcy or receivership, and that in any event no salaries were authorized after 1937, and the corporation was under no obligation to pay.

The issue raised squarely presents for decision whether or not financial difficulties and a factual (but not a legal) necessity which restricts a corporation's freedom of action may be deemed an event similar in nature to a receivership under regulations prescribed by the Commissioner. Section 29.107-3, Regulations 111 as amended, which relates to section 107(d)(2) of the Code, adds nothing to the language of the statute in this respect..

We agree with petitioners that very cogent circumstances deterred the corporation from paying its officer-shareholders any salary during the period of financial distress. Pacific was in a position to foreclose on the hotel and furnishings at any time.

It forebore to do so, and even aided the debtor by paying taxes on the hotel in substantial amounts and agreeing to more favorable loan terms on two occasions. In the words of Pacific's loan officer, this

consideration was shown because he felt "that the properties were being capably and honestly handled," and he expected that Langer and Lindsey "ultimately would work out their difficulties." We can not believe that he would have felt so if they had increased the corporation's steady operating losses by annual withdrawals of \$14,400 as salaries for themselves.

Nonetheless we do not perceive in their voluntary restraint any resemblance to the restriction imposed by a receivership. Financial distress would normally induce a corporation's officers to adopt policies more cautious and conservative than those followed under conditions of prosperity, and by their forbearance to deplete corporate funds by salary payments petitioners' officer-shareholders displayed a prudence clearly indicated as necessary by existing circumstances. But the decision was theirs to make, and they made it. Under a receivership the decision would not have been theirs. Although the receiver might well have made the same decision, in so doing he would have exercised a control conferred on him by law to the exclusion of the corporate officers and legally enforceable without reference to them. It is this legally enforceable control in another that we deem to be the essential characteristic of a bankruptcy or receivership. In *Norbert J. Kenny*, 4 T.C. 750, the creditor held it to a limited extent by virtue of contract. But here the corporation's officers were restricted only by

the dictates of prudence. We are of opinion that their decision and the corporation's straitened circumstances were not similar in nature to a receivership within the meaning of section 107(d)(2), and accordingly hold that the section is here inapplicable.

This holding makes it unnecessary to decide whether or not the corporation was under an obligation to pay the salaries in controversy during the preceding years and whether or not the amounts of the payments made in 1944 and 1945 were less than 15 per cent of the recipient's respective gross incomes for those years.

Reviewed by the Court.

Decisions will be entered for the respondent.

[Seal]: Tax Court of the United States.

Served Sept. 29, 1949.

The Tax Court of the United States
Washington

Docket No. 16756

ESTATE OF R. L. LANGER, deceased, ELEA-
NORE LANGER, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated September 29, 1949, it is

Ordered and Decided: That there is a deficiency in income tax for the calendar year 1944 in the amount of \$3,086.48.

[Seal] /s/ LUTHER A. JOHNSON,
Judge.

Entered Sept. 29, 1949.

Served Oct. 3, 1949.

The Tax Court of the United States
Washington

Docket No. 16757

ELEANORE LANGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated September 29, 1949, it is

Ordered and Decided: That there is a deficiency in income tax for the calendar year 1944 in the amount of \$3,099.06.

[Seal] /s/ LUTHER A. JOHNSON,
Judge.

Entered Sept. 29, 1949.

Served Sept. 30, 1949.

The Tax Court of the United States
Washington

Docket No. 18396

C. ABBOTT LINDSEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion promulgated September 29, 1949, it is

Ordered and Decided: That there are deficiencies in income tax for the calendar years 1944 and 1945 in the respective amounts of \$2,041.07 and \$2,867.32.

[Seal] /s/ LUTHER A. JOHNSON,
Judge.

Entered: Sept. 29, 1949.

Served: Sept. 30, 1949.

The Tax Court of the United States
Washington

Docket No. 18397

PAULINE LINDSEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion promulgated September 29, 1949, it is

Ordered and Decided: That there are deficiencies in income tax for the calendar years 1944 and 1945 in the respective amounts of \$2,041.07 and \$2,867.32.

[Seal] /s/ LUTHER A. JOHNSON,
Judge.

Entered: Sept. 29, 1949.

Served: Sept. 30, 1949.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Docket Nos. 16756, 16757, 18396, 18397

ESTATE OF R. L. LANGER, deceased, ELEA-
NORE LANGER, Executrix; ELEANORE
LANGER; C. ABBOTT LINDSEY; and
PAULINE LINDSEY,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF DECISION OF
THE TAX COURT OF THE UNITED
STATES

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

Estate of R. L. Langer, deceased, Eleanore
Langer, Executrix; Eleanore Langer; C. Abbott
Lindsey; and Pauline Lindsey, Petitioners in the
above-entitled cases which were consolidated for
trial, hereby petition this Court to review the de-
cision of The Tax Court of the United States here-
tofore entered in said proceeding on September
29, 1949. Petitioners respectfully represent:

I.

Jurisdiction

This petition is filed pursuant to Internal Reve-

nue Code sections 1141 and 1142, 26 U.S.C.A., sections 1141 and 1142.

II.

Nature of Controversy

The present controversy relates to the proper determination of the federal income tax liability of petitioners Estate of R. L. Langer, deceased, Eleanore Langer, Executrix (Tax Court Docket No. 16756), and Eleanore Langer (Tax Court Docket No. 16757) for the calendar year 1944, and the federal income tax liability of petitioners C. Abbott Lindsey (Tax Court Docket No. 18396) and Pauline Lindsey (Tax Court Docket No. 18397) for the calendar years 1944 and 1945.

Respondent determined deficiencies in income taxes of petitioners in Dockets Nos. 16756 and 16757 for the calendar year 1944 as follows:

Estate of R. L. Langer, deceased, Eleanore	
Langer, Executrix	\$3,086.48
Eleanore Langer	3,099.96

Respondent determined deficiencies in income taxes of petitioners C. Abbott Lindsey and Pauline Lindsey for the calendar years 1944 and 1945 as follows:

C. Abbott Lindsey	1944	\$2,041.07
	1945	2,867.32
Pauline Lindsey	1944	2,041.07
	1945	2,867.32

The Tax Court of the United States, by its said

decision, sustained respondent's determinations. Petitioners hereby petition for a review of said decision of The Tax Court of the United States.

III.

Venue

Petitioners filed their respective separate federal income tax returns for the calendar years 1944 and 1945 with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California. Accordingly, petitioners are petitioning for a review of said decision of The Tax Court of the United States by this United States Circuit Court of Appeals for the Ninth Circuit.

Wherefore, your petitioners pray that this Court review said decision of The Tax Court of the United States, reverse the same, and issue such order or orders as may be proper in the premises.

Dated: December 1, 1949.

Respectfully submitted,

/s/ DANA LATHAM,

/s/ AUSTIN H. PECK, JR.,

Attorneys for Petitioners.

State of California,
County of Los Angeles—ss.

Austin H. Peck, Jr., being first duly sworn, on oath deposes and says:

I am one of the attorneys for the petitioners in

this proceeding. I have read the foregoing petition and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information, and belief. This petition is not filed for purposes of delay, and I believe that petitioners are justly entitled to the relief sought.

/s/ AUSTIN H. PECK, JR.

Subscribed and sworn to before me this 6th day of December, 1949.

[Seal] /s/ LILLIAN S. FOLTZ,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires April 28, 1950.

[Title of Court of Appeals and Cause]

NOTICE OF FILING OF PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

To the Commissioner of Internal Revenue, Washington, D. C.:

You are hereby notified that petitioners in the above entitled proceeding in the Tax Court of the United States have filed, concurrently herewith, their petition to the United States Circuit Court of Appeals for the Ninth Circuit for review of the decision of the Tax Court in said proceeding. A

copy of said petition for review, together with this notice, are hereby served on you.

Dated: December 6, 1949.

/s/ DANA LATHAM,

/s/ AUSTIN H. PECK, JR.,

Attorneys for Petitioners.

Affidavit of Service

State of California,

County of Los Angeles—ss.

Beulah M. Godges, being first duly sworn, on oath, deposes and says:

That she is a citizen of the United States and a resident of the County of Los Angeles, California; that she is not a party to the within action; and that her business address is 411 West Fifth Street, Los Angeles 13, California.

That on the 6th day of December, 1949, she served the Notice of Filing of Petition for Review of Decision of the Tax Court of the United States and Petition for Review of Decision of the Tax Court of the United States on the respondent by placing a true copy of each in an envelope addressed to the attorney of record for said respondent at the office address of said attorney, as follows: "Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington, D. C."; and by

then sealing said envelope and depositing the same with postage thereon fully prepaid, in the United States mail at Los Angeles, California; and that there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ BEULAH M. GODGES.

Subscribed and sworn to before me this 6th day of December, 1949.

[Seal] /s/ LILLIAN S. FOLTZ,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires April 28, 1950.

Received and filed T.C.U.S. Dec. 12, 1949.

[Title of Court of Appeals and Cause]

NOTICE OF FILING OF DESIGNATION OF
CONTENTS OF RECORD ON APPEAL
AND STATEMENT OF POINTS

To the Commissioner of Internal Revenue, Washington, D. C.:

You are hereby notified that petitioners in the above entitled proceeding in the Tax Court of the United States have filed with the Clerk of the Tax Court petitioners' designation of contents of record on appeal and statement of points. A copy

thereof, and of this notice, are hereby served upon you.

Dated: December 6, 1949.

/s/ DANA LATHAM,

/s/ AUSTIN H. PECK, JR.,

Attorneys for Petitioners.

Affidavit of Service

State of California,

County of Los Angeles—ss.

Beulah M. Godges, being first duly sworn, on oath, deposes and says:

That she is a citizen of the United States and a resident of the County of Los Angeles, California; that she is not a party to the within action; and that her business address is 411 West Fifth Street, Los Angeles 13, California.

That on the 6th day of December, 1949, she served the Notice of Filing of Designation of Contents of Record on Appeal and Statement of Points, to which this affidavit is attached and the Designation of Contents of Record on Appeal and Statement of Points, on the respondent by placing a true copy of each in an envelope addressed to the attorney of record for said respondent at the office address of said attorney, as follows: "Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington, D. C."; and by then sealing said envelope and depositing the same with postage

thereon fully prepaid, in the United States mail at Los Angeles, California; and that there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ BEULAH M. GODGES.

Subscribed and sworn to before me this 6th day of December, 1949.

[Seal] /s/ LILLIAN S. FOLTZ,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires April 28, 1950.

[Title of Causes.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 27, inclusive, constitute and are all of the original papers and proceedings before The Tax Court of the United States as set forth in the "Designation of Contents of Record on Review" on file in my office as the original record in the above entitled proceedings and in which the petitioners in The Tax Court proceedings have initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceedings, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand

and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 11th day of January, 1950.

[Seal] /s/ VICTOR S. MERSCH,
Clerk.

[Endorsed]: No. 12456 United States Circuit Court of Appeals for the Ninth Circuit. Estate of R. L. Langer, Deceased, Eleanore Langer, Executrix, Eleanore Langer, C. Abbott Lindsey and Pauline Lindsey, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed January 17, 1950.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Docket No. 12456

ESTATE OF R. L. LANGER, deceased, ELEA-
NORE LANGER, Executrix; ELEANORE
LANGER; C. ABBOTT LINDSEY; and
PAULINE LINDSEY,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL AND STATEMENT OF
POINTS

To Paul P. O'Brien, Clerk of the United States
Circuit Court of Appeals for the Ninth Cir-
cuit, San Francisco, California:

Petitioners in the above entitled consolidated
proceedings hereby designate the following portions
of the record before the Tax Court of the United
States to be contained in the record on review
before the United States Circuit Court of Appeals
for the Ninth Circuit:

(1) Petition of petitioner R. L. Langer (Docket
No. 16756).

(2) Order substituting Eleanore Langer, Execu-
trix of the Estate of R. L. Langer, deceased, as
petitioner in place of R. L. Langer, deceased
(Docket No. 16756).

(3) Petition of petitioner Eleanore Langer (Docket No. 16757).

(4) Petition and amended petition of petitioner C. Abbott Lindsey (Docket No. 18396).

(5) Petition and amended petition of petitioner Pauline Lindsey (Docket No. 18397).

(6) Answer to petition of petitioner Estate of R. L. Langer, deceased, Eleanore Langer, Executrix (Docket No. 16756).

(7) Answer to petition of petitioner Eleanore Langer (Docket No. 16757).

(B) Answer to petition and amended petition of petitioner C. Abbott Lindsey (Docket No. 18396).

(9) Answer to petition and amended petition of petitioner Pauline Lindsey (Docket No. 18397).

(10) Minute order, or other order, of the Tax Court consolidating the cases for trial and decision.

(11) Findings of fact and opinion of the Tax Court.

(12) Decisions of the Tax Court.

(13) The petition for review of the decision of the Tax Court and notice of filing of petition for review, together with proof of service of said petition and said notice.

(14) This designation of contents of record on appeal and statement of points and the notice of filing thereof, together with proof of service of said designation and notice.

Statement of Points on Which Petitioners
Intend to Rely

(1) The Tax Court erred in entering decisions for the respondent.

(2) The Tax Court erred in not entering decisions for petitioners and each of them.

(3) The Tax Court erred in failing to find or conclude that there were no deficiencies in income taxes of petitioners or any of them for the calendar years involved.

(4) The Tax Court erred in its finding that the failure of Commodore Hotel Co., Ltd., to pay full officers' salaries authorized for the years 1937, 1938, 1939, and 1940 was the consequence of a restraint voluntarily imposed upon itself by said corporation as a result of serious financial difficulties rendering payment of such salaries impossible.

(5) The Tax Court erred in its conclusion that factual necessity restricting a corporation's freedom of action, resulting from serious financial difficulties rendering payment of officers' salaries impossible if corporate operations were to continue is not an event similar in nature to bankruptcy or receivership, for purposes of section 107(d), Internal Revenue Code, 26 U.S.C.A., section 107(d).

(6) The Tax Court erred in its conclusion that the existence of a legally enforceable control in another is the essential characteristic of bankruptcy or receivership, and that, for purposes of section 107(d), Internal Revenue Code, 26 U.S.C.A., sec-

tion 107(d), an event cannot be similar in nature to bankruptcy or receivership if such element of control does not exist.

(7) Assuming, but not conceding, that the Tax Court did not err in its conclusion that the existence of a legally enforceable control in another is the essential characteristic of bankruptcy or receivership, nevertheless the Tax Court erred in its finding or conclusion that such control in another did not exist in this case.

(8) The Tax Court erred in its conclusion that section 107(d), Internal Revenue Code, 26 U.S.C.A., section 107(d) was not properly invoked by petitioners in the determination of their federal income tax liability for the years here involved.

(9) The Tax Court erred in failing to find or conclude that petitioners C. Abbott Lindsey and Pauline Lindsey have overpaid their federal income taxes for the year 1944.

Dated: January 23, 1950.

Respectfully submitted,

/s/ DANA LATHAM,

/s/ AUSTIN H. PECK, JR.,

Attorneys for Petitioners.

Affidavit of Service

State of California,

County of Los Angeles—ss.

Zoe E. Porter, being first duly sworn, on oath, deposes and says:

That she is a citizen of the United States and a resident of the County of Los Angeles, California; and that she is not a party to the within action; and that her business address is 411 West Fifth Street, Los Angeles 13, California.

That on the 23rd day of January, 1950, she served the Designation of Contents of Record on Appeal and Statement of points on the respondent by placing a true copy thereof in envelopes addressed to the attorneys of record for said respondent at the office address of said attorneys, as follows: "Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington, D. C." and "Theron L. Caudle, Assistant Attorney General, United States Department of Justice, Washington 25, D. C."; and by then sealing said envelopes and depositing the same with postage thereon fully prepaid, in the United States mail at Los Angeles, California; and that there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ ZOE E. PORTER.

Subscribed and sworn to before me this 23rd day of January, 1950.

[Seal] /s/ LILLIAN S. FOLTZ,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires April 28, 1950.

No. 12456.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF R. L. LANGER, Deceased; ELEANORE LANGER,
Executrix; ELEANORE LANGER; C. ABBOTT LINDSEY;
and PAULINE LINDSEY,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS.

DANA LATHAM,

AUSTIN H. PECK, JR.,

HENRY C. DIEHL,

1112 Title Guarantee Building, Los Angeles 13,

Attorneys for Petitioners.

MAR 22 1939

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No. 12456.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF R. L. LANGER, Deceased; ELEANORE LANGER,
Executrix; ELEANORE LANGER; C. ABBOTT LINDSEY;
and PAULINE LINDSEY,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS.

Jurisdiction.

This petition for review involves deficiencies in Federal income taxes of petitioners, Estate of R. L. Langer, deceased; Eleanore Langer, executrix, and Eleanore Langer for the calendar year 1944, and of petitioners C. Abbott Lindsey and Pauline Lindsey for the calendar years 1944 and 1945 as follows:

<u>Petitioner</u>	<u>1944</u>	<u>1945</u>
Estate of R. L. Langer,		
Eleanore Langer, Executrix	\$3,086.48	\$
Eleanore Langer	3,099.96	
C. Abbott Lindsey	2,041.07	2,867.32
Pauline Lindsey	2,041.07	2,867.32

The cases of the four petitioners involve identical issues and were presented to and heard by The Tax Court of the United States (hereinafter referred to as the "Tax Court") pursuant to the provisions of Section 272 of the Internal Revenue Code (26 U. S. C. A., Sec. 272). The cases were consolidated for hearing before the Tax Court. [Tr. 84.] The decisions of the Tax Court determining said deficiencies were entered September 29, 1949. [Tr. 98-101.]

This petition for review was filed on or about December 6, 1949 [Tr. 105-106] pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code (26 U. S. C. A., Secs. 1141 and 1142).

Opinion Below.

The only previous opinion rendered in this cause is the opinion of the Tax Court [Tr. 85-97] reported in 13 T. C., No. 59.

Issue Involved.

But one issue is involved in the proceeding:

Did respondent err in determining that amounts received by petitioners during the years 1944 and 1945 (with respect to petitioners, Estate of R. L. Langer, and Eleonore Langer, only the year 1944 is involved), which amounts constituted compensation for services rendered by petitioners prior to said taxable years, were not "back pay" as defined in Section 107(d)(2)(A) of the Internal Revenue Code (26 U. S. C. A., Sec. 107(d)(2)(A)), taxable in the manner prescribed in Section 107(d)(1) of the Internal Revenue Code (26 U. S. C. A., Sec. 107(d)(1))?

Statutes and Regulations Involved.

INTERNAL REVENUE CODE (26 U. S. C. A.):

“Section 107(d)(1). IN GENERAL.—If the amount of the back pay received or accrued by an individual during the taxable year exceeds 15 per centum of the gross income of the individual for such year, the part of the tax attributable to the inclusion of such back pay in gross income for the taxable year shall not be greater than the aggregate of the increases in the taxes which would have resulted from the inclusion of the respective portions of such back pay in gross income for the taxable years to which such portions are respectively attributable, as determined under the regulations prescribed by the Commissioner with the approval of the Secretary.

“(2) DEFINITION OF BACK PAY.—For the purposes of this subsection, ‘back pay’ means (A) remuneration, including wages, salaries, retirement pay, and other similar compensation, which is received or accrued during the taxable year by an employee for services performed prior to the taxable year for his employer and which would have been paid prior to the taxable year except for the intervention of one of the following events: (i) bankruptcy or receivership of the employer; (ii) dispute as to the liability of the employer to pay such remuneration, which is determined after the commencement of court proceedings; (iii) if the employer is the United States, a State, a Territory or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any of the foregoing, lack of funds appropriated to pay such remuneration; or (iv) any other event determined to be similar in nature under regulations prescribed by the Commissioner with the approval of the Secretary; and (B) wages or salaries

which are received or accrued during the taxable year by an employee for services performed prior to the taxable year for his employer and which constitute retroactive wage or salary increases ordered, recommended, or approved by any Federal or State agency, and made retroactive to any period prior to the taxable year; and (C) payments which are received or accrued during the taxable year as the result of an alleged violation by an employer of any State or Federal law relating to labor standards or practices, and which are determined under regulations prescribed by the Commissioner with the approval of the Secretary to be attributable to a prior taxable year. Amounts not includible in gross income under this chapter shall not constitute 'back pay'."

REGULATIONS III:

"Sec. 29.107-3. BACK PAY ATTRIBUTABLE TO PRIOR TAXABLE YEARS.—Section 107(d)(2) defines 'back pay' and section 107(d)(1) limits the amount of tax resulting from the inclusion of such back pay in gross income for the year in which it is received or accrued. Back pay includes compensation, wages, salaries, pensions and retirement pay received or accrued during the taxable year by an employee for services performed prior to the taxable year for his employer and which would have been paid prior to the taxable year but for the intervention of any one of the following events: (1) bankruptcy or receivership of the employer; (2) dispute as to the liability of the employer to pay such remuneration, which is determined after the commencement of court proceedings; (3) if the employer is the United States, a State, a Territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any of the foregoing, lack of funds

appropriated to pay such remuneration; or (4) any other event determined to be similar in nature under these regulations. As to what constitutes bankruptcy and receivership proceedings see section 29.274-1.

“An event will be considered similar in nature to those events specified in section 107(d)(2)(A)(i), (ii), and (iii) only if the circumstances are unusual, if they are of the type specified therein, if they operate to defer payment of the remuneration for the services performed, and if payment, except for such circumstances, would have been made prior to the taxable year in which received or accrued. For the purposes of this section the term ‘back pay’ does not include remuneration which is deemed to be constructively received in the taxable year or years in which the services were performed, remuneration paid in the current year in accordance with the usual practice or custom of the employer even though received in respect of services performed in a prior year or years, additional compensation for past services where there was no prior agreement or legal obligation to pay such additional compensation, or any amount which is not includible in gross income under chapter 1.”

Summary of the Case.

This proceeding was submitted to the Tax Court on the pleadings, a partial stipulation of facts, oral testimony offered by the petitioners, and exhibits introduced in evidence at the hearing.

Between January 1, 1937, and December 31, 1945 (as well as prior and subsequent to said dates), R. L. Langer (herein referred to as “Langer”) and C. Abbott Lindsey (herein referred to as “Lindsey”) were officers and em-

ployees of Commodore Hotel Co., Ltd., a California corporation (herein referred to as "Commodore"), which owned and operated the Commodore Hotel in the City of Los Angeles, California. [Tr. 88.] By a corporate resolution dated April 14, 1937, Commodore undertook to pay to Langer and Lindsey a salary of \$600 per month each from January 1, 1947, and every month thereafter. Pursuant to this resolution, there was paid to each a total of \$4800 during the calendar year 1937. No further payments of salary were made by Commodore to either Langer or Lindsey until 1943. [Tr. 88.]

In each of the years 1933 through 1941, Commodore sustained operating losses, and its balance sheets continuously showed a deficit. [Tr. 88.]

During all of said years, Commodore's principal assets, its hotel building and furnishings, were subject to a deed of trust and chattel mortgage to secure a promissory note payable to Pacific Mutual Life Insurance Co. (herein called "Pacific") in the principal amount of approximately \$250,000. In January, 1937, Commodore was delinquent in payment of interest and principal on said note, and Pacific had advanced additional funds to Commodore for the payment of property taxes. In January, 1937, a new note was executed in the principal amount of \$255,000, representing the balance then due to Pacific, which note provided for payments in monthly installments. Commodore anticipated improved business conditions, which, it thought, would enable it to pay the authorized salaries. Commodore thereafter made payments on said note, but payments again, in 1937, began to be late (constituting default), and Pacific made further advances to Commodore on account of property taxes.

By August, 1941, the amount due to Pacific had been reduced only to \$240,750. In September, 1941, the note was again rewritten, reducing the interest rate and extending the payment period. [Tr. 88-89.]

Commencing in January, 1943, Commodore resumed payments of salaries of \$600 per month each to Langer and Lindsey. Commodore realized operating profits in 1942 and 1943, after making required payments on the indebtedness to Pacific. [Tr. 90.]

In January, 1944, Commodore, by resolution of its board of directors, authorized payment of back salaries to Langer and Lindsey as rapidly as the financial condition of the corporation would permit. Pursuant to said resolution, Commodore paid \$10,000 each to Langer and Lindsey in 1944 on account of back salary. In 1945, Commodore paid \$11,500 to each on account of back salary. [Tr. 90.] These payments were in addition to regular current monthly salaries which were paid.

In their separate tax returns for the year 1944, Langer and wife and Lindsay and wife each reported \$5000 as his community share of the \$10,000 paid to each husband during that year and each computed his tax on these amounts at the rates applicable to the years for which the salary was paid, invoking the benefits of Section 107(d) of the Internal Revenue Code (26 U. S. C. A., Sec. 107(d)). Lindsey and wife each reported \$5750, and computed the tax thereon similarly, for 1945. [Tr. 91-92.] Section 107(d) provides, in effect, that if a salary earner does not, for specified reasons beyond his control (including bankruptcy or receivership of his employer, or an event similar in nature thereto), receive his compensation in the year in which he renders services, but

later receives it, he shall not be required to pay an income tax thereon in the year of receipt greater than he would have had to pay had he received the compensation in the earlier year.

Respondent determined that Section 107(d) of the Internal Revenue Code was not applicable and not properly invoked by petitioners in the computation of their Federal income tax liability for the years 1944 and 1945; and he determined deficiencies accordingly. [Tr. 93.] Petitioners filed petitions in the Tax Court, alleging error on the part of respondent in this determination. [Tr. 2-83.] The Tax Court, through Judge Johnson, decided in favor of respondent. [Tr. 97.] The Tax Court concluded that Commodore's failure to pay the full salaries authorized for 1937, and to pay any salary for the years 1938 through 1942, was the consequence of a restraint voluntarily imposed upon itself by the corporation; and that there was no legally enforceable restriction upon such payments. It then concluded that a legally enforceable control in someone other than the taxpayer is the essential characteristic of bankruptcy or receivership in order to bring the case within the orbit of Section 107(d)(2) of the Internal Revenue Code. Having reached said conclusion, the Tax Court failed to make any findings or conclusions as to the other contentions of the parties in support of their respective positions. [Tr. 95-97.] The Tax Court having sustained the respondent's determination, this petition for review was filed by petitioners.

Specification of Errors.

(1) The Tax Court erred in its finding that the failure of Commodore to pay full officers' salaries authorized was the consequence of a restraint voluntarily imposed upon itself by said corporation.

(2) The Tax Court erred in its conclusion that factual necessity restricting a corporation's freedom of action, resulting from serious financial difficulties rendering payment of officers' salaries impossible if corporate operations are to continue, is not an event similar in nature to bankruptcy or receivership.

(3) The Tax Court erred in its conclusion that the existence of a legally enforceable control in another is the essential characteristic of bankruptcy or receivership, and that, for purposes of Section 107(d) of the Internal Revenue Code (26 U. S. C. A., Sec. 107(d)), an event cannot be similar in nature to bankruptcy or receivership if such element of control does not exist.

(4) Assuming, but not conceding, that the Tax Court did not err in its conclusion that the existence of a legally enforceable control in another is the essential characteristic of bankruptcy or receivership, nevertheless the Tax Court erred in its finding or conclusion that such control in another did not exist in this case.

Summary of Argument.

In the trial of the cases below, the respondent advanced three theories in support of his determination that the provisions of Section 107(d) of the Internal Revenue Code (26 U. S. C. A., Sec. 107(d)), were not properly invoked by petitioners. [Tr. 87.] The Tax Court passed upon only one thereof, namely, whether or not the deferment in payment of salaries was caused by an event similar in nature to bankruptcy or receivership; and having decided said point adversely to petitioners, found it unnecessary to consider respondent's other theories. [Tr. 97.] Therefore, on this appeal, the only question for consideration is whether or not the event which caused deferment in payment of the salaries was similar in nature to bankruptcy or receivership.

The contentions of petitioners are as follows:

(1) During the period from September 1, 1937, through December 31, 1941, Commodore was in a financial and operating condition similar in nature to bankruptcy or receivership within the meaning of Section 107(d) of the Internal Revenue Code. This event or condition, but for the existence of which the payments would have been made, necessitated the deferment of payment of authorized salaries to Langer and Lindsey.

(2) Pacific, by virtue of the secured obligation of Commodore to it, effectively controlled the operations of Commodore. The existence of this control was

sufficient to satisfy the requirements of Section 107(d) of the Internal Revenue Code.

(3) Assuming, without conceding, that the Tax Court's conclusion that a contractual or "legal" restriction upon the payment of officers' salaries is required in order to bring this case within Section 107(d) of the Internal Revenue Code, such restriction existed in this case, and should have been recognized as a proper foundation for the application of said section.

Outline of Argument.

A. The deferment in payment of salaries to Langer and Lindsey was the consequence of an event similar in nature to bankruptcy or receivership.

B. The control exercised by Pacific over the operations of Commodore was sufficient to satisfy the requirements of Section 107(d) of the Internal Revenue Code, and the deferment of payment of the salaries was not the result of a voluntary restraint.

ARGUMENT.

A. The Deferment in Payment of Salaries to Langer and Lindsey Was the Consequence of an Event Similar in Nature to Bankruptcy or Receivership.

The Tax Court, in its findings of fact and opinion [Tr. 85-97], found as facts:

(1) That from 1933 until 1942, Commodore each year sustained operating losses, and its balance sheets constantly indicated a deficit. [Tr. 88.]

(2) That the net deficit reached a maximum of \$63,867.69 in 1941. [Tr. 88.]

(3) That in 1937 Commodore was not only delinquent in the payment of interest on its note to Pacific, but Pacific had advanced funds for taxes on the hotel property [Tr. 88]; and that between January 16, 1937, and June 30, 1939, Commodore was delinquent in payment of monthly installments on the note, and Pacific had had to make further advances for taxes on the hotel property. [Tr. 88-89.]

(4) That for the period in which the authorized salaries were not paid, Pacific was in a position to foreclose on the hotel and furnishings at any time [Tr. 95]; and that very cogent circumstances deterred Commodore from paying any salaries during the period of financial distress.

(5) That Pacific refrained from foreclosure because its officers were of the opinion that Commodore's properties were being capably and honestly handled by Langer and Lindsey. [Tr. 89.]

(6) That such forbearance would not have been shown had Commodore increased its operating losses by annual payments of \$14,400 as salaries to Langer and Lindsey. [Tr. 95-96.]

Notwithstanding these clear findings of fact, the Tax Court decided that no legal restriction of Commodore's freedom of action existed, and that in the absence of such legal restriction, the event may not be deemed to be similar in nature to bankruptcy or receivership within the meaning of Section 107(d) of the Internal Revenue Code. The Tax Court found the existence of what it referred to as *factual necessity* which restricted Commodore's freedom of action, but nevertheless concluded that failure to pay salaries to Langer and Lindsey was the consequence of a restraint voluntarily imposed. Passing for the moment any discussion of the obvious contradiction between the Tax Court's conclusion and its finding just stated, it is apparent that the Court has misconceived the meaning of the phrase "similar in nature to" bankruptcy or receivership.

Webster's New International Dictionary, Second Edition (G. and C. Merriam Co., 1947), defines the word "similar" as follows:

"Nearly corresponding; resembling in many respects; somewhat like; having a general likeness."

The same authority defines "receivership," "receiver," "bankruptcy," and "bankrupt," as follows:

Receivership: "The state or condition of being in the hands of a receiver; as, to put a corporation into, or under, receivership."

Receiver: "A person appointed, ordinarily by a court of equity jurisdiction, to receive, and hold in trust, money or other property which is the subject of litigation, pending the suit, as in case of a person incompetent to manage his property, or of the dissolution and winding up of a partnership or a corporation, etc. The receiver is an officer of the court, and the property held as such by him is not subject to process other than in the case itself. He often obtains authority to continue and manage the business as a going concern."

Bankruptcy: "State of being *actually* or legally bankrupt; a becoming bankrupt." (Emphasis added.)

Bankrupt: "Any person whose property becomes liable to administration under the bankrupt laws. Under the first bankrupt laws (which were directed against fraudulent traders) the bankrupt was a criminal; but, with the amelioration and extension of these laws, the bankrupt is any person who is insolvent or has done any of the acts (called acts of bankruptcy) which the law provides shall entitle his creditors to have his estate administered for their benefit, such as the making of a general assignment, the making of a transfer of his property actually or constructively fraudulent, etc. * * *

"A trader or any person who becomes insolvent."
(Emphasis added.)

Commodore was at no time judicially declared bankrupt. Neither was it placed in the hands of a receiver appointed by a court. Therefore, it cannot bring itself within the provisions of Section 107(d)(2)(A)(i) of the Internal Revenue Code. Nevertheless, it was, in the critical years under consideration, insolvent, and its properties

were being administered under the supervision of Pacific, for Pacific's benefit. Said condition was one "resembling in many respects" bankruptcy or receivership. It was "somewhat like," or "having a general likeness" to the state of being actually bankrupt or the state or condition of being in the hands of a receiver.

The Tax Court has found as a fact that Pacific was in a position to foreclose its deed of trust on the hotel and furnishings at any time. It forbore to do so because it was keeping a close and constant check upon Commodore's operations, and was aware that all of Commodore's available revenues were being turned over to it to be applied on the indebtedness. The Tax Court further found that Pacific would not have shown such forbearance had the authorized salaries been paid. Commodore, in short, was a debtor with its back to the wall. Actually, its continued operations were at the sufferance of Pacific. Petitioners find it difficult to conceive of a condition or event (short of judicial declaration of bankruptcy) more closely resembling bankruptcy or receivership. For all practical purposes, Commodore was in the hands of its principal creditor, and was operating subject to its close supervision and control.

The respondent's Regulations 111, Section 29.107-3, provide that "back pay" shall include compensation which would have been paid but for the intervention of bankruptcy or receivership of the employer, or any other event determined to be similar in nature under the Regulation. Said section further provides that "as to what constitutes bankruptcy and receivership proceedings, see Section 29.274-1." The latter section describes what shall constitute bankruptcy and receivership proceedings for purposes

of the assessment provisions of Section 274 of the Internal Revenue Code (26 U. S. C. A., Sec. 274). Since that section describes actual bankruptcy and receivership proceedings, it is not determinative of what is *similar in nature* to such proceedings.

Section 29.107-3 then states that an event will be considered similar in nature to bankruptcy and receivership only if:

- (a) the circumstances are unusual;
- (b) they are of the type specified in the statute;
- (c) they operate to defer payment of the remuneration for the services performed; and
- (d) payment, but for such circumstances, would have been made prior to the taxable year in which received or accrued.

No further description of what is an event similar in nature to bankruptcy or receivership is afforded by the Regulations.

What has already been said establishes, we submit, that the circumstances existing in the prior taxable years operated to defer payment of the salaries and that the payments, but for such circumstances, would have been made in the earlier years. To use the words of the Tax Court [Tr. 96]:

“* * * by their forbearance to deplete corporate funds by salary payments petitioners’ (*sic*) officer-shareholders displayed a prudence *clearly indicated as necessary by existing circumstances.*” (Emphasis added.)

Implicit in this statement of the Tax Court is the conclusion that the existing circumstances operated to defer payment and that, but for their existence, the payments would have been made in the years in which the services were rendered.

Moreover, it would appear to be indisputable that the existing circumstances were unusual. Indeed, the Tax Court does not indicate otherwise. Financial distress is not a usual characteristic of business, nor is it usual for corporate officers to render services without current compensation.

There remains, in the light of the respondent's Regulations, only the question of whether or not the circumstances were of the type specified in the statute. The Tax Court decided this issue adversely to the petitioners. In this the Court erred.

A judicial declaration of bankruptcy and a judicial appointment of a receiver are events which, in the law, can be defined more or less exactly. What constitutes an event similar in nature to such events is not so readily susceptible to definition. Nevertheless, the facts of this case present a situation so closely akin to actual bankruptcy and receivership that the similarity cannot be escaped. Indeed, only the element of judicial declaration was lacking.

Because neither the statute nor the respondent's Regulations define precisely what events are similar in nature to bankruptcy or receivership, it is necessary to consider what the statutory language was intended to accomplish. Section 107(d) of the Internal Revenue Code is a relief provision. It provides, in effect, that if a salary earner does not, for specified reasons beyond his control, receive

his compensation in the year in which he renders services, but later receives that compensation, he shall not be required to pay an income tax on such compensation in the year of receipt greater than he would have had to pay had he received the compensation in the earlier years. (Indeed, the tax payable may, because of deductions, actually be *less* than it would have been in the years in which services were rendered.) The section permits the computation of the tax on such receipts at rates, and upon a basis, different from that otherwise prescribed. Because the section is a relief provision, it must be liberally construed to effectuate the objectives sought by the Legislature. Mertens, *Law of Federal Income Taxation*, Vol. 1, page 71; *Keeble v. Commissioner*, 2 T. C. 1249 (1943).

In the *Keeble* case, *supra*, the Tax Court was called to interpret Section 107(a) of the Internal Revenue Code (26 U. S. C. A., Sec. 107(a)). The Commissioner of Internal Revenue contended, in that case, that Section 107(a) was a provision granting an exemption from tax and that it should, therefore, be strictly construed. The Court rejected the Commissioner's argument, saying in part:

"The statute is remedial, granting relief to those coming within its terms. A remedial statute should be given a rational, sensible construction and one which will 'give the relief it was intended to provide.' *Bonwit Teller and Co. v. U. S.*, 283 U. S. 258; *F. Harold Johnston, Executor*, 33 B. T. A. 551; *Michel J. A. Bertin*, 1 T. C. 355. 'Common sense interpretation is the safest rule to follow in the administration

of income tax laws,' *Rhodes v. Commissioner*, 100 F. (2d) 966; and 'a desire for equality among taxpayers is to be attributed to Congress, rather than the reverse.' *Colgate Palmolive Peet Co.*, 320 U. S. 422."

All of the subsections of Section 107 of the Internal Revenue Code are directed toward the same general objectives, and should be similarly construed. Therefore, Section 107(d) is entitled to the same liberal interpretation as has been accorded Section 107(a).

If petitioners have brought themselves within the reasonable meaning of Section 107(d), they are entitled to prevail in this proceeding.

The provision was first introduced in the House of Representatives as Section 113 of the Revenue Act of 1943 (H. R. 3687, 78th Cong., 1st Sess.). As introduced, it provided a special method for computing tax only on amounts of back pay resulting from violations of the National Labor Relations Act and the Fair Labor Standards Act, or retroactive wage increases authorized by the National War Labor Board. In other words, as originally introduced, it covered generally only wage adjustments of the type described in Section 107(d)(2)(B) of the existing statute.

The House proposal was eliminated in its entirety by the Senate Finance Committee. The following explanation for said action was given in the report of the committee (Senate Report No. 627, 78th Cong., 1st Sess.):

"The House adopted a provision relating to the taxes on back pay received by an individual for serv-

ices rendered in a prior year because of alleged unfair labor practice under the National Labor Relations Act, or a violation of the Fair Labor Standards Act, or a retroactive increase approved by the National War Labor Board. Your committee was unable to agree with this provision because of its limited application and it has, therefore, been omitted from the bill."

Section 107(d) in its present form was added to the Revenue Act of 1943 by Amendment No. 30 of the Conference Committee. In other words, the Conference Committee agreed that the provision should be broader than had been originally proposed in the House. The statement of the Conference Committee does not furnish any guidance for the determination of the problem here presented.

In view of the clearly expressed intention of the Congress that the section should extend to cases beyond those originally contemplated by the House, and in view of the fact that the provision is remedial in nature and should be construed to accomplish fairness and equality among taxpayers, the interpretation adopted by the Tax Court in this case is erroneous.

B. The Control Exercised by Pacific Over the Operations of Commodore Was Sufficient to Satisfy the Requirements of Section 107(d) of the Internal Revenue Code; and the Deferment of Payment of the Salaries Was Not the Result of a Voluntary Restraint.

Reference has already been made to the Tax Court's finding that there existed in this case a *factual necessity which restricted Commodore's freedom of action*. Notwithstanding this finding, the court concluded that the failure of Commodore to pay the salaries in the earlier years was the consequence of a restraint voluntarily imposed. The conclusion is obviously contrary to the finding. If there was, as a matter of fact, a restriction upon the ability of Commodore to pay, it must follow that the failure to pay was not the consequence of any voluntary action.

The Tax Court ruled that such factual necessity was insufficient to satisfy the requirements of Section 107(d). The court concluded that the control required by the statute is that which is vested in someone other than the corporate officers, and legally enforceable without reference to them. In support of its conclusion, the Tax Court cited *Kenny v. Commissioner*, 4 T. C. 750 (1945). In that case a creditor, as a condition of loaning further monies to a corporation, included in the written loan agreement a requirement that the amount of salary currently payable to a specified corporate officer should not exceed a certain sum, which was less than the officer's authorized salary. When the officer received the difference in a later year, after the restriction had been lifted, he com-

puted his tax in the manner authorized by Section 107(d) of the Internal Revenue Code. The Tax Court upheld his right to do so.

There was no finding by the Tax Court in the *Kenny* case that the financial condition of the debtor corporation was unsound or precarious. For all that appears in the court's findings of fact and opinion, the corporation may have been entirely solvent. As a matter of fact, it is not unusual for lending institutions, as a condition of loaning money, to impose restrictions upon the expenditures of the debtor. The imposition of such restrictions is not limited to insolvent borrowers.

It is apparent that the decision in the *Kenny* case does greater violence to the respondent's conception of the statutory purpose than could ever result from a decision in favor of the petitioners in this case. It is true that, in the *Kenny* case, there was a contractual agreement by the employer not to pay the full authorized salary. To this extent, the normal practice of the corporation was interfered with. But as has already been suggested, there was nothing to indicate that the employer was insolvent or otherwise unable to pay the full salary.

Contrast that picture with the one here presented. Here, the employer was for all practical purposes bankrupt. It was in default upon its indebtedness; its only income producing assets were subject to foreclosure at any time; and the payment of authorized salaries would merely have aggravated this distressed condition. Langer and Lindsey even had to advance moneys of their own to the cor-

poration, in order to forestall action by the creditor. Certainly Commodore was in a condition more nearly approximating bankruptcy or receivership than the employer in the *Kenny* case.

Petitioners have no quarrel with the result in the *Kenny* case. Nor does the respondent, for he has acquiesced in the decision. 1945 *Cumulative Bulletin*, page 4. But if Mr. Kenny was entitled to the relief afforded by Section 107(d), certainly it cannot be denied to the petitioners in this case. The circumstances which existed here, and the actual control exercised by Pacific, were, it is submitted, the very type intended to be covered by the section.

Even if the Tax Court's premise, that there must exist a legally enforceable control in another, is correct, certainly that control existed here. Though Pacific exacted no written agreement from Commodore that it would not pay the authorized salaries, it was possessed of an effective legal control which was every bit as potent as an express written restriction. Pacific held a deed of trust upon Commodore's income producing assets as security for a substantial indebtedness. Had the authorized salaries been paid to Langer and Lindsey, the defaults in payment of the obligation would have been aggravated, and Pacific would undoubtedly have instituted foreclosure proceedings. The Tax Court was of the opinion that Pacific's forbearance from foreclosure would not have continued had the salaries been paid.

What more effective, legally enforceable control can there be than this?

Conclusion.

It is respectfully submitted that the Tax Court erred in its legal conclusions expressed in this cause. It erred in determining deficiencies against the petitioners, and in failing to find that petitioners Lindsey and wife had overpaid their federal income taxes for the year 1944. Accordingly, it is submitted that the decisions of the Tax Court should be reversed.

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No. 12,456

In the United States Court of Appeals
for the Ninth Circuit

ESTATE OF R. L. LANGER, DECEASED, ELEANORE LANGER,
EXECUTRIX, ELEANORE LANGER, C. ABBOTT LINDSEY
AND PAULINE LINDSEY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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PAUL P. O'BRIEN, V

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,456

ESTATE OF R. L. LANGER, DECEASED, ELEANORE LANGER,
EXECUTRIX, ELEANORE LANGER, C. ABBOTT LINDSEY
AND PAULINE LINDSEY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 85-97) are reported at 13 T. C. 419.

JURISDICTION

This petition for review (R. 102-105) involves federal income taxes for the taxable years 1944 and 1945. On September 24, 1947, and February 19, 1948, the Commissioner of Internal Revenue mailed to taxpayers notices of deficiency in the total amount of \$16,002.32. (R. 6-9, 16-19, 26-31, 50-55.) Within ninety days, respectively, thereafter and on December 17, 1947, and May 11, 1948, taxpayers filed peti-

tions with the Tax Court for redetermination of the particular deficiency asserted against each under the provisions of Section 272 of the Internal Revenue Code. (R. 2-9, 11-19, 20-31, 44-55.)* The decisions of the Tax Court affirming the Commissioner's determination of deficiency were entered September 29, 1949. (R. 98, 99, 100, 101.) This case is brought to this Court by a petition for review filed December 6, 1949 (R. 102-107), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Where an insolvent corporation, wholly owned by its officers and their families, was in default on the payment of a note secured by a deed of trust on its principal asset, and after procuring advances from and concessions on its note from its creditor, deferred payment of officers' salaries until first realizing an operating profit, was the deferment of salary payments such as to bring the salaries, when paid, within the operation of Section 107 (d) of the Internal Revenue Code?

STATUTE AND REGULATIONS INVOLVED

These may be found in the Appendix, *infra*.

STATEMENT

R. L. Langer, deceased, and his widow, Eleanore Langer, filed separate tax returns at Los Angeles, California, for 1944. Langer died July 6, 1948, his widow being appointed executrix, and as such was

* Page 55 of the printed record reads that one of the petitions for a redetermination of deficiency was filed May 11, 1949. A check of the docket entries in the Tax Court reveals that this is a typographical error, the correct date of filing being May 11, 1948.

substituted for him in the action brought by him below. (R. 87.)

Langer and family and Lindsey and family each owned one-half of the outstanding stock of the Commodore Hotel Company, a California corporation which operated the Commodore Hotel in Los Angeles. The corporation kept its accounts and filed its tax returns on the cash basis. Langer was president, Lindsey secretary, and by a resolution of the board of directors of April 14, 1937, a salary of \$600 a month was to be paid to each from January 1, 1937, and every month thereafter. Each was paid a total of \$4,800 during 1937, but because of financial difficulties no further payments were made until 1942 or 1943. From 1933 to 1942 the corporation each year sustained operating losses, which reached a maximum of \$14,724.74 in 1939, and its balance sheets constantly indicated a deficit until 1946, reaching a maximum deficit of \$63,867.69 in 1941. (R. 88.)

In 1933 the corporation had placed a deed of trust on its hotel building and a chattel mortgage on the furnishings, its principal assets, to secure its 6% note for \$241,581, payable in monthly instalments of \$2,000. By 1937 it was not only delinquent in the payment of interest on the note to the extent of \$13,419, but the creditor had advanced funds for taxes on the hotel. On January 16, 1937, an agreement was reached with the then holder of the note, Pacific Mutual Life Insurance Company, whereby the corporation agreed to pay off the total due of \$255,000 with interest over a ten year period in monthly instalments beginning at \$500 and increasing to \$1,250. The corporation made the required payments with some delays until June 30, 1939, but Pacific had to make further advances for taxes and by the end of August, 1941, the amount due Pacific had only been reduced to \$240,750. On Septem-

ber 16, 1941, Pacific and the corporation entered into a new agreement, reducing the interest on the balance to 5% and extending the payment period to 1956. The corporation agreed to make a fixed monthly payment of \$1,400 and to pay 50% of its net income to Pacific within thirty days of the end of each year. Net income for this purpose was defined as gross income less \$5,000, operating expenses "including usual and reasonable management charges", upkeep costs, taxes, interest and the principal payments on a second note for \$2,592.62 which the corporation gave to Pacific. This second note was paid off in 1942, and payments have since been made on the principal indebtedness substantially as required. Pacific refrained from foreclosing on the hotel because its officers felt that the corporation's properties were being capably and honestly handled and that Langer and Lindsey would ultimately work out their difficulties. (R. 88-89.)

At a director's meeting held January 2, 1942, Langer, the president, brought up the subject of officers' salaries and the repayment of a \$2,000 loan which he and Lindsey had each made to the corporation. Payment of the salaries and loans was authorized "as soon as there is sufficient net money available", and in the event of nonpayment of the salaries, authority was voted the officers "to execute the Corporation's promissory note to pay said sums at a later date * * * when the assets of the Corporation will permit." On January 2, 1943, the salaries of the president and secretary were again set at \$600 per month for the current year, and the amounts were paid in that year. (R. 89-90.)

After the corporation realized an operating income of \$9,755.23 in 1942 and of \$24,666.17 in 1943, the board of directors on January 3, 1944, mentioning that some salary payments were made in 1942, authorized the payment of back salaries to the officers, and recognized

that there was owing to each \$1,200 for 1937 (later corrected to \$2,400); \$7,200 for each of the years 1938, 1939, 1940, 1941, and \$3,900 for 1942. They then resolved that the corporation pay all back salaries as soon as able to do so. (R. 90.)

Accordingly, Langer and Lindsey were each paid \$17,200 in 1944; Lindsey was paid an additional \$18,700 in 1945. Of the 1944 payments, \$10,000 to each was on account of back salary; of the 1945 payments \$11,500 was on account of back salary to Lindsey. Near the close of 1944 the directors instructed Langer to address the Salary Stabilization Unit of Treasury a letter requesting permission to pay officers' salaries for prior years. The Unit replied that payment of back salaries did not require its approval, "provided there was a bona fide contractual liability on October 3, 1942". (R. 90-91.)

At a directors' meeting December 5, 1945, the president was specifically authorized to pay \$3,000 of surplus on account of officers' back salaries. (R. 91.)

On their separate income tax returns for 1944 Langer and wife and Lindsey and wife each reported \$5,000 as the community share of the \$10,000 paid as back salary to each husband in 1944, and each computed a tax on this share by reference to rates applicable to years for which the salary was paid, invoking the benefits of Section 107 (d) of the Internal Revenue Code. Similarly, Lindsey and wife sought to apply Section 107 (d) with respect to their tax liability for 1945. As to each taxpayer, the Commissioner determined that Section 107 (d) was not applicable, and, adding the amounts received as back salary to other income reported, he recomputed the tax at the rates in effect for the years of receipt. (R. 92-93.)

The Tax Court, on taxpayers' petitions for a redetermination of the deficiencies thus determined, affirmed

the Commissioner's determinations. (R. 93-97.) Taxpayers now bring this consolidated appeal.

SUMMARY OF ARGUMENT

The Tax Court correctly held that there was not present herein a situation wherein salary payments were deferred by the corporation because of the intervention of an event similar in nature to a receivership, within the meaning of Section 107 (d) of the Internal Revenue Code. This holding accords with the statute, the applicable Regulations, and the intent of Congress as expressed in reports concurrent with the enactment of 107 (d). While the statute has but rarely been construed, those cases which have construed it reflect the need for the presence of external control upon a corporation, if the corporate situation is to be considered similar in nature to a receivership. In the case at bar, on the other hand, the restraints imposed on the corporation which operated to defer salary payments to taxpayers were the voluntary restraints of the corporation itself, these being dictated simply by ordinary business prudence. Such restraints of usual commercial prudence are not such as present a situation similar in nature to a receivership.

ARGUMENT

The Tax Court Properly Determined That Taxpayers' Salaries Were Not Deferred Because of an Event Similar in Nature to a Receivership

Under certain circumstances, by application of the provisions of Section 107 (d) of the Internal Revenue Code (Appendix, *infra*), a taxpayer who receives back pay in one year may treat it for taxation as if it had been received in a prior year or years, that is, in the year in which it should have been received. Subsection 107 (d)(2) provides a definition of what shall be considered back pay. The only definition with which

we are concerned herein is that which includes within the definition of back pay, remuneration, including salaries, which would have been received and reported in a prior year except for the intervention of (Appendix, *infra*)—

(i) bankruptcy or receivership of the employer;
 * * * or (iv) any other event determined to be similar in nature under regulations prescribed by the Commissioner with the approval of the Secretary; * * *.

Concededly, we do not have in the case at bar a bankruptcy or receivership of the Commodore Hotel Company. The question presented here is simply whether payment of taxpayers' salaries was deferred because of an event determined to be similar in nature under Regulations prescribed by the Commissioner. The Tax Court held that no such event was present in the instant case. We believe its determination in this respect correct.

Treasury Regulations 111, Section 29.107-3 (Appendix, *infra*), promulgated under the authority of the statute, provide that—

An event will be considered similar in nature to those events specified in section 107 (d) (2) (A) (i), (ii), and (iii) only if the circumstances are unusual, if they are of the type specified therein, if they operate to defer payments of the remuneration for the services performed, and if payment, except for such circumstances, would have been made prior to the taxable year in which received or accrued.

Examining these Regulations in the light of the instant case, we may concede, *arguendo*, that circumstances operated to defer payment which otherwise would have been made in years prior to the taxable years concerned. But there remains the question of

whether the circumstances are (a) unusual, and (b) of the type specified in Section 107(d)(2)(A). It is our position that the circumstances which operated to defer salary payments to taxpayers were neither unusual nor of the type named in the statute, that is, similar in nature to bankruptcy or receivership.

The Tax Court determined that the circumstances were not similar in nature to bankruptcy or receivership, because the deferment in payment was the result of voluntary restraint of the corporation by itself, as opposed to a restriction imposed by a receivership, stating (R. 96):

we do not perceive in their voluntary restraint any resemblance to the restriction imposed by a receivership. Financial distress would normally induce a corporation's officers to adopt policies more cautious and conservative than those followed under conditions of prosperity, and by their forbearance to deplete corporate funds by salary payments petitioners' officer-shareholders displayed a prudence clearly indicated as necessary by existing circumstances. But the decision was theirs to make, and they made it. Under a receivership the decision would not have been theirs.

In this connection it is well to note the Tax Court's factual finding (R. 89) that—

Pacific refrained from foreclosing on the hotel because its officers felt that the corporation's properties were being capably and honestly handled and that Langer and Lindsey would ultimately work out their difficulties.

Not only was the freedom of choice with taxpayers in their conduct of the corporation's affairs, but theirs remained the freedom because of their omission to abuse it. The lack of restraint under which the corporation operated at the hands of Pacific is exemplified by its

failure to restrict salary payments and also by its failure to protest payment of back salary in better times, when the corporation was heavily in the debt of Pacific. In 1941 the problem of salary payments was first acknowledged between the parties, but even then, in defining net income out of which payments were to be made to Pacific, the corporation was allowed to exclude operating expenses, "including usual and reasonable management charges", which would certainly cover officers' salaries. (R. 89.)

While Section 107 (d) is a relief statute to alleviate the ills of certain taxpayers, it must be borne in mind in construing the requirements of that section that there is a fundamental inhibition in the federal tax laws against the spreading of income. Thus, from taxwise time immemorial, the right has been denied both to the Government and to taxpayers to allocate income to years in which it is not received or accrued; our income tax structure is bottomed upon an annual accounting of income, not upon a haphazard allocation to divers taxable years in order to produce the least—or most—tax. *Security Mills Co. v. Commissioner*, 321 U. S. 281. The congressional reports concurrent with and concerning the passage of 107 (d) do not indicate that Congress had in mind any broad and sweeping exception to the doctrine expressed in the *Security Mills* case. The provision had its genesis in a House of Representatives bill, which allowed the spreading of back pay under certain limited circumstances, such as sums received by individuals because of alleged unfair labor practices under the National Labor Relations Act, or because of a violation of the Fair Labor Standards Act, or by retroactive wage increases afforded by the National War Labor Board. H. Rep. No. 871, 78th Cong., 1st Sess., p. 33 (1944 Cum. Bull. 901, 926). But, because of its limited application, this section did not receive Senate ap-

proval. S. Rep. No. 627, 78th Cong., 1st Sess., p. 22 (1944 Cum. Bull. 973, 990). However, the Conference Committee of the two Houses of Congress agreed on a compromise provision which is now 107 (d). In its report (H. Conference Rep. No. 1079, 78th Cong., 2d Sess., p. 45 (1944 Cum. Bull. 1059, 1062-1063)) the Conference Committee, discussing this provision, stated:

The term [back pay] refers only to remuneration the payment of which has been deferred by reason of the unusual circumstances of the type specified in the definition.

Congressional insistence that the provision applies only in "unusual" circumstances withdraws from the provision any aura of liberal construction. Clearly, a taxpayer, to receive the benefits of the provision, must bring himself within its terms. In effect, the statute provides an exemption and is therefore subject to strict scrutiny. *Smart v. Commissioner*, 152 F. 2d 333 (C. A. 2d), certiorari denied, 327 U. S. 804.

Section 107 (d) has been rarely construed. In *Kenny v. Commissioner*, 4 T. C. 750, taxpayer's employer was required, as a condition of an R.F.C. loan, to defer payment of part of the salaries of certain officers, among them the taxpayer therein. The salary deferred, when paid, was held to be "back pay" within 107 (d). The Tax Court found that the situation was not usual, and further, that the employer was restricted under its agreement with R.F.C. in ways which resembled the restrictions placed upon business operations conducted under receivership. That case the Tax Court distinguished in the case at bar, on the ground that the deferment of payment by the corporation herein was its voluntary act. Thus a situation is presented which is different from that in *Kenny*, wherein the court stated that its holding was premised (p. 755) "upon the conclusion that the restrictions on salary payments made by R.F.C.

resemble the restrictions imposed by a receiver." We believe that the Tax Court properly distinguished the *Kenny* case from the situation at bar.

In *Dean v. Commissioner*, 10 T.C. 672, taxpayer's employer deferred payment of incentive pay because a ruling of the Salary Stabilization Unit of the Bureau of Internal Revenue inhibited payment. When a subsequent ruling reversed the Unit's position, payment of the deferred amounts was made. The Tax Court held that this payment came within the definition of the payment of back pay as defined in 107 (d).

Both the *Dean* and *Kenny* cases were reviewed by the entire Tax Court as was the instant case, but no appeal was taken in either of the former. It is clear from both that an element present in them, but which is lacking herein and the presence of which was considered of utmost importance in the *Kenny* case, is a control over the employer preventing the payment of salaries in the normal course of events, as opposed to the voluntary restraint imposed on itself by the corporate employer in the case at bar, however prudent that restraint may have been. Taxpayers (Br. 21-23) argue that the corporation was under such control as is necessary to satisfy the statute. But this argument is defeated by the words of Pacific's loan officer (R. 89, 96), to the effect that the corporation was generally left to its own devices because it was in capable hands. This is hardly the control comparable to that wielded by a receiver or over a corporation in a situation similar in nature to a receivership. Not only did Pacific not control the corporation, it paid its taxes and relieved it of some of its loan obligations to assist the operation by corporate officers. (R. 88-89.) Pacific's attitude of inaction and satisfaction with the corporation's administration is diametrically opposed to the restraints of receivership or some unnamed similar proceeding.

Taxpayers argue (Br. 15)—

For all practical purposes, Commodore [the corporation] was in the hands of its principal creditor, and was operating subject to its close supervision and control.

We submit, on the contrary, that the record shows exactly the opposite, that for all practical purposes the corporation was accorded full freedom of action by Pacific. In this conclusion, we are supported by the Tax Court's conclusions below.

The facts at bar indicate, in fact, that this is merely the *usual* case of a corporation, not the unusual as demanded by the statute, where in bad times salaries are deferred and the earners thereof are subsequently reimbursed in later, more prosperous years. In such a situation, the payments should be considered those of the year of payment. Cf. *Lucas v. Ox Fibre Brush Co.*, 281 U. S. 115. Not only was the situation at bar usual in commercial practice, the facts do not reveal a situation similar in nature to a receivership. Accordingly, the Tax Court's decision should be affirmed.

If, however, this Court should deem the decisions below erroneous, we contend that the case should be returned to the Tax Court for a determination on the other two grounds proposed by the Commissioner below to justify his determination of deficiency, namely, that taxpayers have not shown that the so-called back pay received in the taxable years exceeded fifteen per centum of the gross income of each for such years, within the meaning of Section 107 (d)(1), and that, in any event, no salaries were authorized after 1937, and the corporation was under no obligation to pay up the sums deferred. The Tax Court (R. 97) found it unnecessary to reach these two propositions, and its findings of fact are not sufficient for this Court to base a determination thereon. Accordingly, if it be de-

terminated that taxpayers received the amounts involved in an unusual situation in the nature of a receivership, the case should be returned to the Tax Court to find facts upon which a decision can be made as to the Commissioner's alternative arguments. *Commissioner v. Stinchfield's Estate*, 161 F. 2d 555 (C.A. 9th); *Lewis v. Commissioner*, 160 F. 2d 839 (C.A. 1st); *Diller v. Commissioner*, 91 F. 2d 194 (C. A. 9th).

CONCLUSION

In view of the foregoing, it is submitted that since the Tax Court has committed no error either in law or in fact, its decisions should be affirmed.

Respectfully submitted,

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Attorney General.

APRIL, 1950.

APPENDIX

Internal Revenue Code:

SEC. 107 [As added by Sec. 220(a) of the Revenue Act of 1939, c. 247, 53 Stat. 862]. COMPENSATION FOR SERVICES RENDERED FOR A PERIOD OF FIVE YEARS OR MORE.

* * * * *

(d) [As added by Sec. 119 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] BACK PAY.—

(1) *In General*.—If the amount of the back pay received or accrued by an individual during the taxable year exceeds 15 per centum of the gross income of the individual for such year, the part of the tax attributable to the inclusion of such back pay in gross income for the taxable year shall not be greater than the aggregate of the increases in the taxes which would have resulted from the inclusion of the respective portions of such back pay in gross income for the taxable years to which such portions are respectively attributable, as determined under regulations prescribed by the Commissioner with the approval of the Secretary.

(2) *Definition of Back Pay*.—For the purposes of this subsection, “back pay” means (A) remuneration, including wages, salaries, retirement pay, and other similar compensation, which is received or accrued during the taxable year by an employee for services performed prior to the taxable year for his employer and which would have been paid prior to the taxable year except for the intervention of one of the following events: (i) bankruptcy or receivership of the employer; (ii) dispute as to the liability of the employer to pay such remuneration, which is determined after the commencement of court proceedings; (iii) if the employer is the United States, a State, a Territory, or any political subdivision thereof,

or the District of Columbia, or any agency or instrumentality of any of the foregoing, lack of funds appropriated to pay such remuneration; or (iv) any other event determined to be similar in nature under regulations prescribed by the Commissioner with the approval of the Secretary; and (B) wages or salaries which are received or accrued during the taxable year by an employee for services performed prior to the taxable year for his employer and which constitute retroactive wage or salary increases ordered, recommended, or approved by any Federal or State agency, and made retroactive to any period prior to the taxable year; and (C) payments which are received or accrued during the taxable year as the result of an alleged violation by an employer of any State or Federal law relating to labor standards or practices, and which are determined under regulations prescribed by the Commissioner with the approval of the Secretary to be attributable to a prior taxable year. Amounts not includible in gross income under this chapter shall not constitute "back pay".

(26 U.S.C. 1946 ed., Sec. 107.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.107-3 [As added by T.D. 5389, 1944 Cum. Bull. 196]. BACK PAY ATTRIBUTABLE TO PRIOR TAXABLE YEARS.—Section 107 (d)(2) defines "back pay" and section 107 (d)(1) limits the amount of tax resulting from the inclusion of such back pay in gross income for the year in which it is received or accrued. Back pay includes compensation for wages, salaries, pensions, and retirement pay received or accrued during the taxable year by an employee for services performed prior to the taxable year for his employer and which would have been paid prior to the taxable year but for the intervention of any one of the follow-

ing events: (1) bankruptcy or receivership of the employer; (2) dispute as to the liability of the employer to pay such remuneration, which is determined after the commencement of court proceedings; (3) if the employer is the United States, a State, a Territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any of the foregoing, lack of funds appropriated to pay such remuneration; or (4) any other event determined to be similar in nature under these regulations. As to what constitutes bankruptcy and receivership proceedings see section 29.274-1.

An event will be considered similar in nature to those events specified in section 107 (d) (2) (A) (i), (ii), and (iii) only if the circumstances are unusual, if they are of the type specified therein, if they operate to defer payments of the remuneration for the services performed, and if payment, except for such circumstances, would have been made prior to the taxable year in which received or accrued. For the purposes of this section the term "back pay" does not include remuneration which is deemed to be constructively received in the taxable year or years in which the services were performed, remuneration paid in the current year in accordance with the usual practice or custom of the employer even though received in respect of services performed in a prior year or years, additional compensation for past services where there was no prior agreement or legal obligation to pay such additional compensation, or any amount which is not includible in gross income under Chapter 1.

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No. 12456

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ESTATE OF R. L. LANGER, Deceased, ELEANORE LANGER,
Executrix; ELEANORE LANGER; C. ABBOTT LINDSEY,
and PAULINE LINDSEY,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONERS.

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No. 12456

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Executrix; ELEANORE LANGER; C. ABBOTT LINDSEY,
and PAULINE LINDSEY,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONERS.

I.

The Statute Involved Must Be Construed so as to
Effectuate Its Objectives.

Respondent, citing *Smart v. Commissioner*, 152 F. 2d
333 (C. C. A. 2d, 1945), argues that:

“In effect, the statute provides an exemption and
is, therefore, subject to strict scrutiny.”

The opinion in the *Smart* case, which involved Sec. 107
(a) of the Internal Revenue Code, contains the following
statement by Judge Learned Hand (152 F. 2d at page
335):

“On the other hand, the section is an exemption
and as such must submit to close scrutiny.”

With due respect to the Court of Appeals for the Second Circuit, it is believed that the characterization of the section as an exemption is incorrect. The exemption provisions of the Internal Revenue Code permit particular taxpayers, or particular types of income, to escape income taxation. No such privilege is granted by Sec. 107. None of the petitioners' income here under consideration has escaped tax. The entire amounts are includible, and have been included, in their gross income. Therefore, there has been no exemption of this income from taxation. Sec. 107 simply specifies a *rate* of tax, and a method of computation, different from that prescribed for normal purposes.

Petitioners contend that because it is a remedial provision, Sec. 107(d) must be so construed as to afford the relief intended by Congress. Petitioners recognize that in order to receive the benefits of the section they must bring themselves within its scope. This, it is respectfully submitted, they have done. But exemption of income from the burden of taxation is not an issue in this case.

II.

**The Circumstances Were Unusual; and the Deferment
Was Not a Voluntary Act.**

Respondent makes the rather astounding argument (Resp. Br. p. 8) that petitioners had untrammelled freedom of choice because they failed to assert their freedom. Specifically, the argument is that:

“Not only was the freedom of choice with taxpayers in their conduct of the corporation’s affairs, but theirs remained the freedom because of their omission to abuse it.”

The mere statement of the proposition answers it. It could as well be argued that the innocent victim of armed robbery voluntarily surrenders his watch and his wallet because of his failure to resist the encroachment upon his liberty and accept the probable violent consequences.

At page 9 of his brief, respondent refers to the 1941 modification of the loan agreement, in which there was contained a definition of net income out of which contingent payments to Pacific were to be made. The provision permitted the corporation to deduct operating expenses, including management expenses. The reason for inserting such a provision was that, in the absence of some definition of net income, dispute might arise as to the extent of the corporation’s liability for the contingent payments required by the 1941 modification. If any inference can fairly be drawn from said provision, it would seem to be that there was, immediately prior thereto, some restraint upon salary payments.

Finally, respondent argues that this is the *usual* case of a corporation which in bad times defers payment of executive salaries. For this Court to accept that proposition, it would not only have to conclude that insolvency is a usual characteristic of business operations, but also that while in receivership or bankruptcy a corporation usually fails to pay any executive salaries whatever. It is believed that neither of said conclusions would be sound.

Conclusion.

For the foregoing reasons, as well as those stated in petitioners' opening brief, the decisions of the Tax Court should be reversed.

Respectfully submitted,

DANA LATHAM,

AUSTIN H. PECK, JR.,

HENRY C. DIEHL,

Attorneys for Petitioners.

May 1, 1950.

No. 12457

United States
Court of Appeals
for the Ninth Circuit.

KURT ADOLPH TAUCHEN,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration
and Naturalization Service, San Francisco,
California,

Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division

FILED

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PAUL P. O'BRIEN,
CLERK

No. 12457

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Court of Appeals
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KURT ADOLPH TAUCHEN,

Appellant,

VS.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco, California,

Appellee.

Transcript of Record

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Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Northern District of California,

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San Francisco, California.

Attorney for Defendant and Appellee.

United States of America

PETITION FOR NATURALIZATION

[Under General Provisions of the Nationality Act
of 1940 (Public, No. 853, 76th Cong.)]

To the Honorable the District Court of The United
States at San Francisco, Calif.

This petition for naturalization, hereby made and
filed, respectfully shows:

(1) My full, true, and correct name is Kurt
Adolf Tauchen.

(2) My present place of residence is 1957
Yosemite Ave., Berkeley 7, Calif.

(3) My occupation is Registered Patent Agent.

(4) I am 40 years old.

(5) I was born on December 4, 1906, in Berlin,
Brandenburg, Germany.

(6) My personal description is as follows: Sex
male, color white, complexion fair, color of eyes
grey, color of hair blond, height 5 feet 6 inches,
weight 148 pounds, visible distinctive marks, scars
on chin, forehead and cheek, race white, present
nationality British (by naturalization in 1937).

(7) I am not married * * *

(8) I have no children.

(9) My last place of foreign residence was Chipstead, Surrey, England.

(10) I emigrated to the United States from Surrey, England via Canada.

(11) My lawful entry for permanent residence in the United States was at Rouses Point, N. Y., under the name of Kurt A. Tauchen on Aug. 26, 1938 on the D.&H.R.R. as shown by the certificate of my arrival attached to this petition.

(12) Since my lawful entry for permanent residence I have not been absent from the United States, for a period or periods of 6 months or longer, * * *

(13) I declared my intention to become a citizen of the United States on May 7, 1940 in the District Court of the United States at Chicago, Ill.

(14) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, State, or sovereignty of whom or which at this time I am a subject or citizen, and it is my intention to reside permanently in the United States.

(15) I am not, and have not been for the period of at least 10 years immediately preceding the date of this petition, an anarchist; nor a believer in the unlawful damage, injury, or destruction of property,

or sabotage; nor a disbeliever in or opposed to organized government; nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government.

(16) I am able to speak the English language (unless physically unable to do so).

(17) I am, and have been during all of the periods required by law, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States.

(18) I have resided continuously in the United States of America for the term of 5 years at least immediately preceding the date of this petition, to wit, since Aug. 26, 1938 and continuously in the State in which this petition is made for the term of 6 months at least immediately preceding the date of this petition, to wit, since September 12, 1944.

(19) I have not heretofore made petition for naturalization. * * *

(20) Attached hereto and made a part of this, my petition for naturalization, are my declaration of intention to become a citizen of the United States (if such declaration of intention be required by the naturalization law), a certificate of arrival from the Immigration and Naturalization Service of my said lawful entry into the United States for permanent residence (if such certificate of arrival be required

by the naturalization law), and the affidavits of at least two verifying witnesses required by law.

(21) Wherefore, I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America. * * *

(22) I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, that the same are true to the best of my own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters I believe them to be true, and that this petition is signed by me with my full, true name: So Help Me God.

/s/ KURT ADOLF TAUCHEN.

Affidavit of Witnesses

The following witnesses, each being severally, duly, and respectively sworn, depose and say:

My name is Walter E. Mathi, my occupation is Engineer, I reside at 1810-67th Ave., Oakland, California, and

My name is J. W. Speer, my occupation is Merchant, I reside at 1957 Yosemite Ave., Berkeley, California.

I am a citizen of the United States of America; I have personally known and have been acquainted in the United States with Kurt Adolph Taucher, the petitioner named in the petition for naturaliza-

tion of which this affidavit is a part, since September, 1944, to my personal knowledge the petitioner has resided, immediately preceding the date of filing this petition, in the United States continuously since the date last mentioned, and at Berkeley in the State of California continuously since September, 1944 and I have personal knowledge that the petitioner is and during all such periods has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and in my opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

I do swear (affirm) that the statements of fact I have made in this affidavit of this petition for naturalization subscribed by me are true to the best of my knowledge and belief: So Help Me God.

/s/ WALTER E. MATHI.

/s/ J. W. SPEER.

Subscribed and sworn to before me by above-named petitioner and witness in the respective forms of oath shown in said petition and affidavit in the office of clerk of the said court at San Francisco, California, this 6th day of May, Anno Domini 1947.

I Certify That Certificate of Arrival No. 11-245996 from the Immigration and Naturalization Service, showing the lawful entry for permanent residence of the petitioner above named, together

with Declaration of Intention No. 158380 of such petitioner, has been by me filed with, attached to, and made a part of this petition on this date.

C. W. CALBREATH,
Clerk.

[Seal] /s/ T. L. BALDWIN,
Deputy Clerk.

Oath of Allegiance

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So Help Me God. In acknowledgment whereof I have hereunto affixed my signature.

/s/ KURT ADOLF TAUCHEN.

Sworn to in open court, this day of ,
A.D. 19. . . .

C. W. CALBREATH,
Clerk.

* * *

Petition denied: List No. 2266 Oct. 14-1949 failure to establish attachment to U. S. etc.

Petition continued from List 2249 July 11-49.

Reason off calendar.

Cert of loyalty filed Mar. 1, 1949, 10-20-49, filed mot. petnr. to set aside Judgment of denial. 11-3-49. Filed U. S. Memorandum in opposition to alter judgment. 11-3-49. Mot. ord. sub. Petnr. to Nov. 25-49 to ans. memo. & U. S. 10 days for brief. Filed petr's reply Memo. Nov. 23-1949. Dec. 5, 49 Filed U. S. reply. Dec. 9, 1949 filed Order denying Motion to alter judgment. Notice of Appeal filed Jan. 7-50. Jan. 14, 1950 filed reporter's transcript of Oct. 14-1949 hrg.

NATURALIZATION PETITIONS RECOMMENDED TO BE DENIED

Date October 14th, 1949. List No. 2266.

This list consists of Four sheets. Sheet No. 1.

To the Honorable the District Court of the United States, sitting at San Francisco, California:

F. P. Boland, J. F. O'Shea duly designated under the Nationality Act of 1940 (54 Stat. 1156) to conduct preliminary hearings upon petitions for naturalization to the above-named Court and to make findings and recommendations thereon, has personally examined under oath at a preliminary hearing the following Twenty (20) petitioners for naturalization and their required witnesses, has found for

the reasons stated below, that such petitions should not be granted, and therefore recommends that such petitions be denied.

Petition No. 8799-M

Name of Petitioner: Lem Gim Wong.

Reason for Denial: Failure to prosecute (request).

Petition No. 76895

Name of Petitioner: Rosaura Velasquez.

Reason for Denial: Failure to prosecute petition.

Petition No. 77073

Name of Petitioner: Athanosios Zeropetos.

Reason for Denial: Failure to prosecute petition.

Petition No. 81439

Name of Petitioner: Hilda Ursala Jackman.

Reason for Denial: Failure to prosecute (request).

Petition No. 82452

Name of Petitioner: Giuseppina Beria.

Reason for Denial: Failure to prosecute petition.

Petition No. 85719

Name of Petitioner: Kurt Adolf Tauchen.

Reason for Denial: Failure to establish that he has been attached to the principles of the Constitution and well disposed to the good order happiness of the United States.

Petition No. 86202

Name of Petitioner: Rudolfo Alagon Andoy.

Reason for Denial: Failure to establish that he has been a person of good moral character.

Petition No. 86302

Name of Petitioner: Alfio Rubino.

Reason for Denial: Failure to establish that he has been a person of good moral character.

Petition No. 86494

Name of Petitioner: Augusto Lopes Costa.

Reason for Denial: Failure to establish that he has been a person of good moral character.

Petition No. 87987

Name of Petitioner: Emilio De Guzman.

Reason for Denial: Failure to prosecute petition.

Petition No. 88150

Name of Petitioner: Jose Gonzales Reyes.

Reason for Denial: Failure to prosecute petition.

Petition No. 88183

Name of Petitioner: Pilar Franco Ruiz.

Reason for Denial: Failure to prosecute (request).

Petition No. 89114

Name of Petitioner: Harry Copas.

Reason for Denial: Failure to establish that he has been a person of good moral character.

Petition No. 89152

Name of Petitioner: Jose Amador Timada.

Reason for Denial: Failure to establish that he has been a person of good moral character.

Petition No. 89548

Name of Petitioner: Nick Pappademetriou.

Reason for Denial: Failure to prosecute petition.

Petition No. 89983

Name of Petitioner: Pierre Georges Mengin.

Reason for Denial: Failure to prosecute petition.

Petition No. 90174

Name of Petitioner: Pietro Taormina for Rosario Taormina.

Reason for Denial: Failure to prosecute (request).

Petition No. 90337

Name of Petitioner: Gaetano Reale.

Reason for Denial: Failure to prosecute petition.

Petition No. 90820

Name of Petitioner: Sam Miraglia.

Reason for Denial: Failure to establish that he has been a person of good moral character.

Petition No. 90880

Name of Petitioner: Kee Low.

Reason for Denial: Failure to establish that he has been a person of good moral character.

Date October 14th, 1949.

Respectfully submitted,
/s/ F. P. BOLAND.

(Signature of officer in attendance at final hearing)

In the District Court of The United States

Date October 14th, 1949.

List No. 2266.

This list consists of Four sheets.

Sheet No. Two.

ORDER OF COURT

United States of America,
Northern District of California,
Southern Division—ss.

Upon consideration of the petitions for naturalization listed on List No. 2266 sheet One dated October 14th, 1949, presented in open Court this 14th day of October, A.D., 1949, It Is Hereby Ordered that each of the said petitions be, and hereby is, denied, except those petitions listed below.

* * *

It is further ordered that petitions listed below be continued for the reasons stated.

Petition No. 82452

Name of Petitioner: Giuseppina Beria.

Cause for Continuance: Off Calendar.

Petition No. 86494

Name of Petitioner: Augusto Lopes Costa.

Cause for Continuance: Off Calendar (request of petitioner).

Petition No. 87987

Name of Petitioner: Emilio De Guzman.

Cause for Continuance: Off Calendar.

Petition No. 89114

Name of Petitioner: Harry Copas.

Cause for Continuance: Off Calendar (request of petitioner).

Petition No. 90337

Name of Petitioner: Gaetano Reale.

Cause for Continuance: Off Calendar.

Petition No. 90880

Name of Petitioner: Kee Low.

Cause for Continuance: Off Calendar (to be put on calendar of Judge Roche).

By the Court.

/s/ DAL M. LEMMON,
Judge.

In the District Court of the United States, Northern
District of California, Southern Division

FINDINGS AND RECOMMENDATIONS OF
DESIGNATED EXAMINER IMMIGRA-
TION AND NATURALIZATION SERVICE

(Final Hearing: October 14, 1949)

“The findings of any such designated examiner upon any preliminary hearing shall be submitted to the Court at the final hearing on the petition with a recommendation that the petition be granted, or denied, or continued, with the reasons therefor * * *” (8 U.S.A. 733(b).)

Kurt Adolf Tauchen

85719

Petition was filed on May 6, 1947 under the General Provisions of the Nationality Act of 1940.

Petitioner was born in Berlin, Germany on December 4, 1906. In 1937 he became a British subject by naturalization. He has resided continuously in the United States since August 26, 1938, when he was admitted for permanent resident, with the exception of one three-month trip to Europe in 1939.

On December 9, 1941 he was apprehended as a potentially dangerous alien enemy and was interned by order of the Attorney General dated April 1, 1942. On December 7, 1943 he was paroled and effective November 15, 1945 his parole was terminated.

While in internment he stated that he would not bear arms against Great Britain and Germany.

He is not a conscientious objector but put his refusal on the grounds that, despite his objections, he had been classified as a German and a potentially dangerous alien enemy. He would not bear arms against Great Britain because it might be treason.

The Service feels that the attitude of petitioner toward defending this country creates a doubt as to his attachment and loyalty, which doubt should be resolved in favor of the government.

It is therefore recommended that this petition be denied.

A True Copy Attest,

C. W. CALBREATH,
Clerk.

[Seal] By /s/ T. L. BALDWIN,
Deputy Clerk.

[Endorsed]: Filed Oct. 14, 1949.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 55719

In the Matter of the
Naturalization of KURT A. TAUCHEN

Before: Hon. Dal M. Lemmon,
Judge.

REPORTER'S TRANSCRIPT

October 14, 1949

Appearances:

For the Immigration and Naturalization
Service:

FRANCIS P. BOLAND.

For the Applicant:

THEODORE H. LASSAGNE,
Attorney.

The Clerk: Contested naturalization matters.

Mr. Boland: If the Court please, it is customary with the other judges in this court to call matters which involve—that is petitioners who are represented by attorneys first. There are four cases; does your Honor wish to follow that practice?

The Court: Yes.

Mr. Boland: The first case represented by an attorney is No. 8, 55719, K. A. Tauchen. That is a question of lack of attachment.

KURT A. TAUCHEN

Being first duly sworn, was examined as follows:

Examination

By Mr. Boland:

Q. State your name. A. Kurt A. Tauchen.

Q. Now Mr. Tauchen, you were born in Germany, December 5, 1906, weren't you?

A. Yes.

Q. And how old were you when you left Germany for Great Britain?

A. I did not leave Germany for Great Britain. I never lived in Germany. I went to Austria, lived in Vienna. I was about twenty-two when I left Vienna to go to England.

Q. And while in England did you take out British citizenship? A. I did.

Q. Then did you live in England until 1938 when you came to this country?

A. Until 1937 really, or 1938; I had two addresses.

Q. And then you entered the United States lawfully for permanent residence August 26, 1938?

A. That is correct.

Q. You are not married? A. No.

Q. You never were married? A. No.

Q. You were interned, apprehended and interned on December 9, 1941, weren't you? A. Yes.

Q. And then you were released on parole December 7, 1943? A. Yes.

(Testimony of Kurt A. Tauchen.)

Q. Then your parole was terminated November 15, 1945?

A. I am not sure about the latter date; I think it was a year earlier.

Q. You were free at that time? A. Yes.

Q. While you were interned you were questioned by officers of this service, weren't you, in regard to your willingness to bear arms against Germany and Great Britain?

A. I am not sure if I was questioned by officers of this service.

Q. But you were questioned?

A. I was questioned, yes, on various occasions.

Q. And did you state that you would not be willing to bear arms against Great Britain?

A. That is correct. I beg your pardon. Yes, I stated that.

Q. And did you also state that you would not serve against Germany except you would serve against Germany in every way except for combatant services? A. That is correct.

Q. Did you base your objection on religious grounds? A. No.

Q. What was your reason for not being willing to serve against Germany?

A. I must, in order to make myself understood, I must say, before I was interned I was asked on repeated occasions if I was willing to bear arms against Germany and every occasion I answered in the affirmative. But after I was officially classi-

(Testimony of Kurt A. Tauchen.)

As a German, I was interned for two years as a German National. Then I thought if I answered the question in the affirmative I would be guilty of treason.

Q. And what was your reason for not being willing to bear arms against Great Britain?

A. That was also the reason in the case of Great Britain.

Mr. Boland: The evidence upon which the petitioner was apprehended consisted largely of hearsay and matters which we could not bring into Court, so we are not recommending denial because of the internment or because of the facts which brought about the apprehension; we are recommending denial because of his unwillingness to serve this country in any way in the military forces during the statutory period.

We feel that that indicated a lack of attachment.

Mr. Lassagne: I would ask Your Honor to bear with me to some extent in this proceeding. I have been a member of this bar, of this court some fifteen years, but my practice has been patent litigation.

I appear on behalf of Mr. Tauchen. He is a technical patent man. He has done work for me for five years while he has been living in California.

I think it will be in order to bring out at least two items, and Your Honor may wish to ask the witness some questions after that. I may be a little inexperienced in bringing out the facts you wish

(Testimony of Kurt A. Tauchen.)

to know, but I would ask the witness **first, whether** during the period of his internment or at any time any charges of violation of any law of the United States were brought against him.

The Witness: Never.

Mr. Lassagne: And secondly, I would ask the witness whether if admitted to citizenship on the presently pending petition he would be willing to bear arms against any national.

The Witness: Certainly.

Mr. Lassagne: And then do we understand your refusal to bear arms against Great Britain and Germany at the time you stated you refused to bear arms against them was based upon apprehension that such declaration would not only be dishonorable, but possibly a violation of law by which you were bound by under antecedent citizenship obligations?

The Witness: Yes.

Mr. Lassagne: I think the objection, Your Honor, on the basis of that kind of testimony is a technical one which no doubt the Immigration Service feels at liberty to urge. But this man, as I stated, is a technical patent man; he is acutely conscious of the binding effect of provisions of law and the obligations of honorable conduct, and he feels that having taken a loyalty oath to Great Britain at that time he acquired British citizenship, if while he was still bound by that oath and notwithstanding the fact that he had applied for

(Testimony of Kurt A. Tauchen.)

United States citizenship he stated that he would bear arms against the country he was a citizen of, it would be a dishonorable declaration—but it in no way mitigates against his willingness to bear arms. He has declared on behalf of the United States that as soon as he becomes a citizen of this country the same thing was applicable to his statements with respect to Germany. When after he was interned and before he was officially classified by reason of the document into citizenship as a German for purposes of internment, he stated he was willing to bear arms against Germany. Then it was only after he was apprehended he thought he might be liable to some legal penalties for such a declaration by reason of the United States having classified him as a German and the possibility he might even be deported. In those days, no one knew what would happen. He renounced that willingness and stated he would not bear arms against Germany, although willing to engage and did engage in non-combatant activities in support of the United States War Effort.

The Court: What did he do?

The Witness: In the internment camp I volunteered to work as a lumberjack to clear artillery ranges. And when in internment we were asked to volunteer to do work for the Army. I volunteered and I worked, I cleared artillery ranges in a forest near there, a dangerous job, not only the job itself, but because of the internees. They assumed a very hostile attitude.

(Testimony of Kurt A. Tauchen.)

Mr. Boland: I would like to point out to the Court that Section 307 of the Nationality Act, Subdivision 8, provides that no person except as hereinafter provided in this Act shall be naturalized unless such petitioner—one, two and three, the three subdivisions—the third subdivision provides during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States.

Now, a person who will not bear arms without qualification for the United States, unless it is based on religious scruples, cannot be said during that statutory period to have been attached to our form of Government.

Mr. Lassagne: Might I add one word? That I can't think the law could be construed to require a person to be willing to permit that which might be a crime, a dishonorable act in violation of laws before he may be bound as a matter of attachment.

The Court: Of course, the contention of the Naturalization Service is entirely based upon the statement he having made to the Naturalization Service he would not bear arms against either England or Germany.

It is submitted; call the next one.

(Application denied.)

[Endorsed]: Filed Jan. 14, 1950.

[Title of District Court and Cause.]

MOTION UNDER F R C P RULE 59(e)
TO ALTER JUDGMENT

To the Honorable United States District Court for
the Northern District of California, Southern
Division:

Now comes the applicant, Kurt Adolph Tauchen,
by his attorney, and respectfully moves the Court
to alter the judgment entered on October 14th, 1949
denying applicant's petition for admission to citi-
zenship by granting said petition.

In support of this motion, applicant relies upon
the attached Memorandum of Points and Authori-
ties and submits the motion thereon, waiving oral
hearing.

Dated at San Francisco, California, this 21st day
of October, 1949.

KURT ADOLPH TAUCHEN
By /s/ THEODORE H. LASSAGNE,
His Attorney.

Memorandum of Points and Authorities

The judgment herein denies applicant's petition
for admission to citizenship on the ground that he
has failed to establish that he has been "attached
to the principles of the Constitution" during the
period relied upon by law.

The sole basis upon which it was contended that
lack of such attachment was demonstrated were
applicant's statements:

1. That while classified as a German by the United States he would not bear arms against that country; and

2. That while he remained a subject of Great Britain he would not bear arms against that country.

The attorney for the Immigration and Naturalization Service expressly disclaimed any other ground of objection to applicant's naturalization.

The present motion is brought for the purpose of respectfully directing the attention of the Court to authorities which, it is submitted, establish that statements of this kind are not any evidence whatever of lack of attachment to the principles of the Constitution; which authorities counsel was unable to bring to the attention of the Court at the hearing.

The cases relied upon are:

In re Siem, 284 Fed. 868 (D.C. Mont. 1921);
and

U. S. vs. Siem, 299 Fed. 582 (CCA 9; 1924).

Lasse A. Siem was a Norwegian citizen whose application for admission to citizenship was opposed on the ground that during World War I he had claimed draft exemption because of his alienage; it being urged that this demonstrated lack of "attachment to the principles of the Constitution." Judge Borquin overruled the objection in an elaborate opinion which makes very clear the analogy between that case and the present one.

In the companion case, the United States petitioned to cancel Siem's citizenship on the same

ground, but Judge Borquin's denial of such cancellation was affirmed by our Circuit Court of Appeals.

In so far as the present applicant's case differs from the Siem case, it differs in aspects more favorable to applicant. Siem, as a citizen of a neutral country, was unwilling to bear arms against any adversary of the United States; Tauchen is perfectly willing to bear arms against any adversary of this country upon becoming its citizen, and has qualified his willingness, while still an alien, only by declining to commit himself to treason against a country of which he would be regarded as a citizen under international law.

Since the cited cases make it clear that such claims of exemption from military service, being proper under our laws, do not evidence any lack of attachment to the principles of the Constitution, and applicant's statements taken in their entirety amount to nothing more than such a claim of exemption, it is believed proper to take this means to direct the attention of the Court to these authorities, and to request reconsideration and alteration of the present judgment.

Respectfully submitted,

/s/ THEODORE H. LASSAGNE,
Attorney for Applicant.

Affidavit of service by mail.

[Endorsed]: Filed Oct. 20, 1949.

[Title of District Court and Cause.]

ORDER

The designated examiner held a preliminary hearing and submitted to the court at the final hearing on the petition of Kurt Adolph Tauchen for naturalization his recommendation that the same be denied upon the ground that there was a doubt as to petitioner's attachment and loyalty. The petition was denied. A motion under Rule 59(e) is before the court. The motion seeks to alter the judgment by granting the petition.

Petitioner was born in Berlin, Germany, December 4, 1906. He lived in Vienna, Austria, until he was twenty-two years of age, at which age he took up his residence in England. There he took out British citizenship. In 1938 he came to this country from England. He has resided here continuously since then. On December 9, 1941, he was apprehended as a potentially dangerous alien enemy and was interned by order of the Attorney General dated April 1, 1942. He was paroled on December 7, 1943. His petition was filed May 6, 1947. While in internment he was questioned on various occasions and stated that he would not be willing to bear arms against Great Britain and that he would not serve against Germany. He did state to his questioners that he would serve the United States "in every way except for combatant services." He admitted that his objection was not on religious grounds. His

reason now given for the position taken by him was, in his own words: "I must, in order to make myself understood, I must say, before I was interned I was asked on repeated occasions if I was willing to bear arms against Germany and every occasion I answered in the affirmative. But after I was officilaly classified a German, I was interned for two years as a German National. Then I thought if I answered the question in the affirmative I could be guilty of treason." He gave the same reason for his not being willing to bear arms against Great Britain. Later at the hearing his counsel brought out through further questioning that his refusal was based upon an apprehension that declaration of willingness would not only be dishonorable but possibly a violation of law in the light of his antecedent citizenship obligations and that if the pending petition were granted he would be willing to bear arms against any nation with which the United States might be involved in war.

We must look to petitioner's statements when made to determine his then attitude. His present explanations and elaborations are relevant but not controlling. His former declarations were unequivocal. He is a man of education. He speaks, and has more than an average understanding of, the English language. If the statements he then made did not convey his thoughts, he could have qualified them. The interpretation he now gives should have been given then if what he then said did not express his attitude. The conclusion is logical that what he did say was what he intended to say and

what he intended his listeners to understand him to say.

Section 707 of 8 U.S.C.A. provides in part that no person shall be naturalized unless for the period of five years immediately preceding the filing of his petition he has been attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. The burden of proving that for that period he was so attached and so disposed is upon the petitioner.¹ He has failed to sustain that burden. He is not a conscientious objector. He deliberately stated that he would not bear arms against two designated foreign countries. This shows lack of attachment to the principles of the Constitution and a disposition other than to the good order and happiness of the United States.²

The motion to alter the judgment by granting the petition is denied.

Dated: December 8, 1949.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed Dec. 8, 1949.

¹United States v. Schwimmer, 279 U.S. 644; United States v. Macintosh, 283 U.S. 605; Lakebo v. Carr, 111 Fed. 2d 732; Allan v. United States, 115 Fed. 2d 804; Wixman v. United States, 167 Fed. 2d 808.

²In re MacKay, 71 F. Supp. 397; United States v. Schwimmer, *supra*; In re Losey, 39 F. Supp. 37.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now petitioner Kurt Adolph Tauchen, above-named, and gives notice that he hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment denying his petition for naturalization entered in this matter on October 14, 1949, and from the order denying petitioner's motion to alter said judgment entered in this matter on December 8, 1949.

San Francisco, California, January 6, 1950.

/s/ THEODORE H. LASSAGNE,
Attorney for Petitioner.

[Endorsed]: Filed Jan. 7, 1950.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes now Kurt Adolph Tauchen, petitioner-appellant, and pursuant to Rule 75(a) and (o) of the Federal Rules of Civil Procedure and Rule 11 (as amended January 1, 1949) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Petition for Naturalization.
2. List 2266 (Form N-484) of Naturalization Petitions Recommended to be Denied, or certified copy thereof.
3. Order (Form N-484A) denying Petition for Naturalization, or certified copy thereof.
4. Findings and Recommendations of the Designated Examiner filed October 14, 1949.
5. Reporter's Transcript of Proceedings in open Court before the Honorable Dal M. Lemmon on October 14, 1949.
6. Motion to Alter Judgment filed October 10, 1949.
7. Order on Motion to Alter Judgment filed December 8, 1949.
8. Notice of Appeal filed January 7, 1950.
9. Designation of Contents of Record on Appeal (this paper).

Dated at San Francisco, California, this 11th day of January, 1950.

/s/ THEODORE H. LASSAGNE,
Attorney for
Petitioner-Appellant.

Affidavit of service by mail.

[Endorsed]: Filed Jan. 12, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals, or true and correct copies, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to-wit:

Copy of the Petition for Naturalization.

Copy of Naturalization Petitions Recommended to be Denied.

Copy of Order of Court Denying Petition for Naturalization.

Findings and Recommendations of Designated Examiner Immigration and Naturalization Service.

Reporter's Transcript of October 14, 1949.

Motion Under F.R.C.P. Rule 59(e) to Alter Judgment.

Order Denying Motion to Alter Judgment

Notice of Appeal.

Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 18th day of January, A.D. 1950.

C. W. CALBREATH,

Clerk.

[Seal] By /s/ M. E. VAN BUREN,

Deputy Clerk.

[Endorsed]: No. 12457. United States Court of Appeals for the Ninth Circuit. Kurt Adolph Tauchen, Appellant, vs. Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 18, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit
Appeal No. 12457

KURT ADOLPH TAUCHEN,

Appellant,

vs.

BRUCE G. BARBER, District Director, etc.

Appellee.

CONCISE STATEMENT OF POINTS ON
WHICH APPELLANT INTENDS TO
RELY ON APPEAL

Comes now appellant, above named, and makes the following concise statement of the points on which he intends to rely in the United States Court

of Appeals for the Ninth Circuit on appeal from the Judgment entered on October 14, 1949, in this matter, and from the order denying petitioner-appellant's motion to alter said judgment entered on December 8, 1949:

1. The District Court erred in holding that petitioner evidenced lack of attachment to the principles of the Constitution by stating that he was unwilling to bear arms against countries to which he owed the allegiance of a citizen, until admitted to United States citizenship.

2. The District Court erred in finding that petitioner's statements were unqualified by such explanation, when made.

Dated at San Francisco, California, this 2nd day of February, 1950.

/s/ THEODORE H. LASSAGNE,
Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed Feb. 3, 1950.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION

Appellant, Kurt Adolph Tauchen, hereby adopts the designation of contents of record on appeal, heretofore filed in the United States District Court, and already a part of the record on appeal herein,

and in addition thereto, this Appellant's Designation and the Concise Statement of Points on which Appellant Intends to Rely on Appeal, filed concurrently herewith, as his designation on Appeal of the record to be printed.

Dated at San Francisco, California, this 2nd day of February, 1950.

/s/ THEODORE H. LASSAGNE,
Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed Feb. 3, 1950.

No. 12,457

IN THE
United States
Court of Appeals
For the Ninth Circuit

KURT ADOLPH TAUCHEN,

Appellant,

VS.

BRUCE G. BARBER, District Director, Im-
migration and Naturalization Service,
San Francisco, California,

Appellee.

BRIEF ON BEHALF OF APPELLANT

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San Francisco 4, California,

Attorney for Appellant.

FILED

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No. 12,457

IN THE
United States
Court of Appeals
For the Ninth Circuit

KURT ADOLPH TAUCHEN,

Appellant,

vs.

BRUCE G. BARBER, District Director, Im-
migration and Naturalization Service,
San Francisco, California,

Appellee.

BRIEF ON BEHALF OF APPELLANT

This is an appeal from an Order of the United States District Court for the Northern District of California, Southern Division, denying appellant's Petition for Naturalization, and a further Order denying appellant's Motion to Alter Said Judgment.

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court of the United States herein is based upon the following statutory provision:

“Exclusive jurisdiction to naturalize persons as citizens of the United States is hereby conferred upon the following specified courts: District Courts of the United States * * *.”

United States Code, Title 8, Section 701.

Appellant's petition herein (Record, page 2) was filed in the United States District Court for the Northern District of California, Southern Division, on May 6th, 1947. The said District Court, on October 14th, 1949, ordered appellant's petition denied (Record, page 12).

The appellate jurisdiction of the United States Court of Appeals for the Ninth Circuit herein, is based upon the following statutory provision:

“The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court.”

United States Code, Title 28, Section 1291.

The District Court's Order of October 14th, 1949 was a final decision of the District Court which may be reviewed on appeal in this court under the provisions of the jurisdictional statute last above quoted (*Tutun v. U. S.*, 270 U.S. 568; 70 L.Ed. 738; 46 S.Ct. 425).

The running of the thirty day period within which an appeal from said final decision was permitted by Rule 73(a) of the *Federal Rules of Civil Procedure* was ter-

minated by the filing, on October 20th, 1949, of a timely "Motion under FRCP Rule 59(e) to Alter Judgment" (Record, page 23), and the full time for appeal herein commenced to run from the entry, on December 8th, 1949, of an Order (Record, page 26) of the District Court denying said motion.

Within thirty days after the entry of said Order, to-wit: on January 7th, 1950, appellant filed with the District Court a Notice of Appeal (Record, page 29).

STATEMENT OF THE CASE

Appellant's Petition for Naturalization (Record, pages 2 to 5) sets forth that he was born in Berlin, Germany, on December 4th, 1906; acquired British citizenship by naturalization in 1937; and emigrated to the United States from England via Canada on August 26th, 1938. On May 7th, 1940, he formally declared his intention to become a citizen of the United States, and on May 6th, 1947, his present petition was filed, together with an Affidavit of Witnesses (Record, pages 5 and 6) stating that they had known appellant since September, 1944 and had personal knowledge that he was a person of good moral character attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States.

On October 14th, 1949, the United States Immigration and Naturalization Service filed in the District Court a list of "Naturalization Petitions Recommended to Be Denied" (Record, pages 8 to 12) including a recommendation for the denial of appellant's petition because of failure to establish attachment to the principles of the Con-

stitution and good disposition to the good order and happiness of the United States.

Concurrently, the Immigration and Naturalization Service filed "Findings and Recommendations of Designated Examiner Immigration and Naturalization Service" (Record, pages 14 and 15) setting forth the findings of the designated examiner of the Immigration and Naturalization Service upon which the recommendation for the denial of appellant's petition was based.

Thereafter, on the same day, appellant testified in open court in support of his petition. As shown by the Transcript of testimony (Record, pages 16 to 22) and other evidence in the Record, appellant, Kurt Adolph Tauchen, was born in Berlin, German, on December 4th, 1906. He went to Austria, where he lived in Vienna until he was about 22 years of age, when he left Vienna to go to England. In 1937 he acquired British citizenship by naturalization.

He entered the United States lawfully for permanent residence on August 26th, 1938, and on May 7th, 1940 he formally declared his intention to become a citizen of the United States.

However, on December 9th, 1941, he was interned (Record, page 17) "as a potentially dangerous alien enemy" (Record, page 14), and he remained in the custody of the United States Government until December 7th, 1943, although at no time during his internment, or otherwise, was any charge of violation of any law of the United States ever brought against him (Record, page 20).

While appellant was confined in an internment camp under the circumstances described, the internees were

afforded the opportunity to volunteer to perform non-combatant services for the United States Army, and appellant so volunteered. During this time he worked at clearing artillery ranges, although other internees evidenced a hostile attitude toward him because of his having undertaken such work (Record, page 21).

Prior to his internment, appellant had repeatedly stated that he was willing to bear arms against Germany (Record, page 18). However, while in internment he was questioned on various occasions, and in response to certain of the questions propounded, he stated that he would not bear arms against Great Britain and Germany, putting his refusal on the grounds that despite his objections he had been classified as a German and a potentially dangerous alien enemy, and that he would not bear arms against Great Britain because it might be treason (Record, page 15).

At the hearing in the District Court on October 14th, 1949, appellant in response to questions propounded by the attorney for the Immigration and Naturalization Service again stated that his reason for not being willing to serve against Germany at the time that he was questioned during internment was that notwithstanding his prior expressions of willingness to bear arms against Germany, he had at that time been officially classified as a German and interned for two years as a German national, so that he thought that if he answered the question in the affirmative, he would be guilty of treason (Record, pages 18 and 19). He also repeated as his reason for not being willing to bear arms against Great Britain that he thought that if he answered such a question in the affirmative, he would be guilty of treason (Record, page 19).

He stated without qualification, however, that if he were admitted to citizenship on the pending petition he would be willing to bear arms against any country with which the United States might become involved in war (Record, page 20).

The United States District Court then entered an Order of Court (Record, pages 12 and 13) denying appellant's Petition for Naturalization on the ground of failure to establish that he had been attached to the principles of the Constitution and well disposed to the good order and happiness of the United States.

On October 20th, 1949, appellant filed in the District Court a motion under FRCP Rule 59(e) to alter judgment (Record, pages 23 to 25). In a memorandum of points and authorities appended thereto the attention of the District Judge was directed to certain authorities hereinafter discussed establishing that a claim of exemption from the draft laws on the ground of alienage was not evidence of lack of attachment to the principles of the Constitution, and pointing out that appellant, far from asserting any such broad claim of exemption, was merely assigning antecedent, and what he then believed to be presently subsisting, citizenship obligations as a ground for refusal to bear arms against countries to which such obligations were owed; being entirely willing to bear arms in behalf of the United States against any other country even prior to becoming a citizen of the United States, and being entirely willing to bear arms against any country without limitation upon becoming a citizen of the United States.

The District Court denied this motion in an Order (Record, pages 26 to 28) including an opinion assigning

the erroneous supposition that appellant's statements of the reasons for his unwillingness to bear arms against Germany and Great Britain were not given at the time he voiced the refusal, and basing the denial of the motion upon the supposition that his original statements made while in internment were deliberate and unqualified.

Questions Presented.

The present appeal, therefore, presents the following questions:

1. Can an alien rightfully be adjudged lacking in attachment to the principles of the Constitution solely because of unwillingness to bear arms, prior to admission to citizenship, against specified countries to which he believed himself obligated as a national under the doctrine of dual citizenship?

2. Was the trial court in error in finding as a fact that appellant's refusals to bear arms were unqualified when made?

3. Was the *res gestae* of applicant's statements, in fact, sufficient to rebut any judicial inference that such statements were motivated by lack of attachment to the principles of the Constitution?

SPECIFICATION OF ERRORS

1. The District Court erred in failing and refusing to hold, as a matter of law, that the assignment of antecedent and subsisting citizenship obligations as a ground for refusal to bear arms against countries to which such obligations are owed rebuts any inference that such refusal is motivated by lack of attachment to the principles of the Constitution of the United States.

2. The District Court erred in finding, as a fact, that appellant failed to assign as his reason for his statement that he would refuse to bear arms against Germany and Great Britain, at the time he made the statement, his antecedent and subsisting citizenship obligations to Germany and Great Britain.

SUMMARY OF ARGUMENT

All questions affecting appellant's qualifications for citizenship have been favorably passed upon in all respects save one; whether a statement of his unwillingness to bear arms against Germany and Great Britain was made under circumstances warranting a judicial determination that by it he demonstrated "lack of attachment to the principles of the Constitution."

The courts have the duty of acting in a purely judicial capacity in determining this question and, unlike the Congress, do not act as a matter of "sovereign grace."

Even a neutral alien cannot be adjudged to lack attachment to the Constitution for having asserted a lawful claim of exemption from military service.

Appellant asserted his unwillingness to bear arms against only two countries to which he owed antecedent obligations arising from birth and naturalization, and which obligations he believed to be subsisting when the assertion was made.

At the same time, he affirmatively demonstrated his good will toward this country by voluntarily performing non-combatant services, although interned and subjected to the hostility of other internees.

The trial court erroneously supposed that appellant unqualifiedly and without any explanation, refused to bear

arms against Germany and Great Britain, and the Record shows the error of that supposition.

Therefore, the present case does not require that this Court decide whether the trial court's application of the law to the supposed facts was or was not correct.

This Court is asked only to apply the law to the true facts as shown by the Record herein.

On such a basis, the Order denying appellant's petition for naturalization should be reversed.

ARGUMENT

The questions presented by this appeal can be approached only upon the basis of an understanding of the proper functions of the Congress, the Immigration and Naturalization Service, and the Courts, respectively, in determining the eligibility of aliens for naturalization.

The Congress may grant or withhold the privilege of naturalization at its will, for its act is one of sovereign grace, and no alien acquires a vested right to citizenship merely by arrival on our shores (*U. S. v. Rosika Schwimmer*, 279 U.S. 644; 79 S.Ct. 448; 73 L.Ed. 889).

The Court, unlike the Congress, does not act as a matter of sovereign grace. When the Congress has determined that aliens possessing certain qualifications may be admitted to citizenship by certain courts, the court exercises only the judicial function of determining whether an applicant possesses those qualifications or not (*In re Fordiana*, 98 Conn. 435; 120 Atl. 338, 339).

The views of the Immigration and Naturalization Service, which administers the laws relative to naturalization, carry great weight and are entitled to earnest considera-

tion, but they are not binding upon the court (*Petition of Zogbaum*, 32 Fed.(2d) 911, 913).

Finally, the Court of Appeals is not bound to accept an ultimate finding or conclusion of the District Court as to a petitioner's failure to sustain the burden of proof of establishing his attachment to the principles of the Constitution (*Stasiukevich v. Nicholls*, 168 Fed.(2d) 474).

In the present case all questions affecting appellant's qualifications for citizenship have been favorably passed upon in all respects save one; and that is that his statement that he would be unwilling to bear arms against Germany or Great Britain, made under the circumstances shown by the record herein, was such conclusive evidence that he was not attached to the principles of the Constitution nor well disposed toward the good order and happiness of the United States, that, in the judicial discretion lodged in the court, his petition must be denied (*Tutun v. United States*, 12 Fed.(2d) 763, 764 (C.C.A. 1; 1926).

Evidence of Unwillingness to Bear Arms Is Not Evidence of Lack of Attachment Where Petitioner Is Exempted by Law.

Any diversity of opinion on the question of the power of a naturalization court to hold a *lawful* unwillingness to bear arms as a bar to naturalization, by construing such a refusal as evidence of "lack of attachment to the principles of the Constitution," has been settled, so far as this Circuit is concerned by this Court's decision in *United States v. Siem*, 299 Fed. 582, which has since been cited and followed by the First Circuit in *Tutun v. United States*, 12 Fed.(2d) 763.

In the *Siem* case the petitioner for naturalization was a declarant neutral alien who had claimed exemption in the draft of 1917 on the ground of alienage, but had been rejected as physically unfit apparently without his claim of exemption for alienage being passed upon. At the subsequent hearing on his petition for naturalization it was urged that his claim of exemption on the ground of alienage manifested that he was not "attached to the principles of the Constitution." District Judge Borquin overruled this contention in *In re Siem*, 284 Fed. 868; the opinion in which is so pertinent to the present case that if quoted at all herein it would have to be quoted in full.

The United States then filed a petition to set aside the certificate of naturalization granted to Siem, and from a denial thereof appealed to this Court, which affirmed the District Court in *United States v. Siem*, 299 Fed. 582.

In the *Tutun* case the petitioner for naturalization had claimed exemption from the World War I Selective Service Act on account of his alienage, and the District Court denied him admission to citizenship solely upon the ground that such a claim of exemption proved that he was not "attached to the principles of the Constitution."

The petitioner appealed from this ruling, and in its opinion (*Tutun v. U. S.*, 12 Fed.(2d) 763) the Circuit Court of Appeals, citing this Court's decision in the *Siem* case, reversed the District Court and squarely held that even the "wide discretion * * * lodged in the judge who hears a petition for naturalization" could not be exercised to raise as a bar against a petitioner for citizenship a lawful claim of exemption from military service which Congress had not seen fit to declare disqualifying.

Appellant's Unwillingness to Bear Arms Was Not Only Lawful but Obligatory.

Bearing in mind that when appellant was questioned, during his internment, concerning his willingness to bear arms against Germany and against Great Britain, the question was manifestly answered by him with reference to his nationality at the time he was questioned, there can be no question but that his negative answer was consonant with the laws of the United States and at the same time obligatory under both moral and international law.

He was, at that time, classified by the United States as an enemy alien (Record, page 14), because of his birth in Germany, and had been interned as such without any charge of violation of any law of this country ever having been brought against him (Record, page 20).

Being so *classified*, he was ineligible for induction into the armed forces of the United States under the *United States Code*, Title 50, Appendix Section 303(a).

Also, appellant was at that time a citizen of Great Britain; having acquired such citizenship by naturalization in 1937 (Record, pages 2 and 17). Since the question as to appellant's willingness to bear arms against Great Britain necessarily presupposed the existence of a state of war between the United States and Great Britain, appellant would have been ineligible for induction under such circumstances by the terms of the same statutory provision.

Therefore, appellant's unwillingness to bear arms against Germany and Great Britain was not only legally justified by his *alien* status, in the same way that the claimed exemptions of the neutral alien petitioners in the *Siem* and *Tutun* cases, *supra*, were legally justified; his

enemy alien status rendered him wholly ineligible so to bear arms against these countries.

Furthermore, since municipal law determines how citizenship may be acquired and divested, and it follows that persons may have a dual nationality (*Perkins, Secretary of Labor, et al. v. Elg*, 307 U.S. 325, 329), appellant, at the time he was questioned during his internment, had reasonable cause to believe that the implementation, or perhaps even the expression, of any willingness to bear arms against either Germany or Great Britain might subject him to criminal penalties for treason should he, in the future, become subject to the jurisdiction thereof.

Even should he remain outside the jurisdiction of the countries against which such an offense was committed, the mere commission of the offense would be a dishonorable act. As stated by Judge Borquin in *In re Siem, supra*:

“For petitioner to acquiesce in draft into federal military service would be infidelity to and an offense against Norway—a poor recommendation to citizenship in this country. Unfaithfulness to Norway might be followed by unfaithfulness to this country. The better citizen to Norway, the better to this country.”

Any Unfavorable Inference from Appellant's Statement Is Negatived by His Voluntary Non-Combatant Service.

While it is thus demonstrated that appellant's statement respecting his unwillingness to bear arms against Germany and Great Britain does not constitute a *legal* basis for holding that he lacked attachment to the principles of the Constitution, the lack of any *factual* basis for such a holding is demonstrated by the testimony that he stated his willingness to serve against Germany “in every

way except for combatant services" (Record, page 18), and that he actually did volunteer for and work at clearing artillery ranges for the Army, notwithstanding that by so doing he incurred the hostility of other internees (Record, page 21).

The Trial Court's Opinion Assigns an Erroneous Supposition as Distinguishing the Present Case from Those Cited Herein.

The initial Order of Court (Record, page 12) herein, did not include any opinion. The later Order (Record, pages 26 to 28) did.

In this opinion, the trial court made it clear that it regarded the testimony given by appellant at the hearing of October 14th, 1949 as an afterthought, and not as a repetition in substance of what he had said, during his internment, at the time he stated his unwillingness to bear arms. In this connection the Court said:

"We must look to petitioner's statements when made to determine his then attitude. His present explanations and elaborations are relevant but not controlling. His former declarations were unequivocal. * * * If the statements he then made did not convey his thoughts, he could have qualified them. The interpretation he now gives should have been given then if what he said did not express his attitude."

* * * * *

"He deliberately stated that he would not bear arms against two designated foreign countries. This shows lack of attachment to the principles of the Constitution and a disposition other than to the good order and happiness of the United States."

The Record Shows the Error of This Supposition.

The "Findings and Recommendations of Designated Examiner Immigration and Naturalization Service" (Record, pages 14 and 15) filed at the hearing of this case in the trial court and before the oral testimony was given, state:

"While in internment he stated that he would not bear arms gainst (sic) Great Britain and Germany.

"He is not a conscientious objector but *put** his refusal on the grounds that, despite his objections, he had been classified as a German and a potentially dangerous alien enemy. He would not bear arms against Great Britain because it might be treason."

The testimony given by appellant in court on this particular point was as follows:

"Q. What was your reason for not being willing to serve against Germany?

A. I must, in order to make myself understood, I must say, before I was interned I was asked on repeated occasions if I was willing to bear arms against Germany and every occasion I answered in the affirmative. But after I was officially classified a German, I was was interned for two years as a German National. Then I thought if I answered the question in the affirmative I would be guilty of treason.

Q. And what was your reason for not being willing to bear arms against Great Britain?

A. That was also the reason in the case of Great Britain" (Record, pages 18 and 19).

*The choice of the past tense is emphasized here as referring to "while in internment."

CONCLUSION

The present case does not require that this Court decide whether or not the conclusion of the trial court on the question of attachment to the principles of the Constitution was a correct deduction from the supposed facts stated in the Court's opinion. What is presented to this Court is a clear demonstration that the trial court misconceived undisputed and important facts of the case, and based its conclusion upon a supposition which is contradicted by the record.

Therefore, appellant does not challenge the established rules that the burden of proving attachment to the principles of the Constitution is upon one who petitions for naturalization, and that the finding of a trial court with respect to lack of attachment will seldom be disturbed by an appellate court.

He asks only that the question of attachment be adjudicated in the light of the true facts and not upon the basis of an erroneous supposition.

It is submitted that appellant's statement, prior to admission to United States citizenship, that he was unwilling to bear arms against Germany and Great Britain while he remained bound by the obligation of nationality to those countries, was not evidence of "lack of attachment to the principles of the Constitution," because:

(a) Appellant was not only exempted from, but was ineligible under the laws of the United States for, such service; and

(b) It was clearly motivated by respect for both the moral and municipal law which universally condemns treason.

Appellant therefore submits that the Order denying his
Petition for Naturalization should be reversed.

Respectfully submitted,

THEODORE H. LASSAGNE,
Attorney for Appellant.

No. 12,457

IN THE

United States Court of Appeals
For the Ninth Circuit

KURT ADOLPH TAUCHEN,

Appellant,

vs.

BRUCE G. BARBER, District Director,
Immigration and Naturalization Service,
San Francisco, California,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

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FILED

MAY 4 - 1950

PAUL P. O'BRIEN,

CLERK

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No. 12,457

IN THE

**United States Court of Appeals
For the Ninth Circuit**

KURT ADOLPH TAUCHEN,

Appellant,

vs.

BRUCE G. BARBER, District Director,
Immigration and Naturalization Ser-
vice, San Francisco, California,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

JURISDICTION.

Appellant filed his appeal on January 6, 1950, from an Order denying his petition for naturalization entered in the District Court of the United States for the Northern District of California dated October 14, 1949, and a further Order denying appellant's Motion to Alter Said Judgment dated December 8, 1949, upon his failure to establish to the satisfaction of the District Court that he had shown himself to be attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, as required by

Section 307(a) of the Nationality Act of 1940 (8 U.S.C.A. 707(a)) under which Section he filed his petition. (See appendix.)

His appeal designates Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco, California, as the appellee. The appeal is ineffective because the appellee designated is not, and cannot be made to be, the proper party litigant in this proceeding since he is not empowered by Congress to grant the relief sought in plaintiff's bill of complaint.

The administration of the immigration and naturalization laws is placed generally under the authority of the Attorney General of the United States. *Congress has entrusted to the Courts alone the power to grant or deny citizenship.* 8 U.S.C.A. 701. (See appendix.) The District Director of the United States Immigration and Naturalization Service is powerless to grant the relief sought by the appellant.

The United States of America is the only proper party to be named as appellee.

In the case of *Bonham, District Director of Immigration v. Chi Yan Cham Louie*, 166 F. (2d) 15, and in *Carmichael v. Wong Choon Hoi*, 164 F. (2d) 696, the Ninth Circuit Court dismissed appeals where the local District Director sought to bring the action in his own name. The Court held he was not a proper party to the litigation. Furthermore, a motion to substitute the United States of America as appellant in the *Chi Yan Cham Louie* case, supported by the

appellee's stipulation that the United States be so substituted, was denied on the ground that such stipulation could not confer jurisdiction.

It seems clear, therefore, that in this case, as in those above cited, the appeal should be dismissed for lack of the proper party defendant.

STATEMENT OF THE CASE.

The appellant was born in Berlin, Germany, on December 4, 1906 and thereafter lived in Vienna, Austria, until he became twenty-two years of age, when he went to live in England where he became a naturalized British subject. He entered the United States on August 26, 1938, and has maintained his residence here since then. He has never been married. (T. 2, 17.) On May 7, 1940, he declared his intention to become a citizen of the United States in the United States District Court at Chicago, Illinois. (T. 3.)

He filed his petition for naturalization No. 85719 in the United States District Court at San Francisco, California, on May 6, 1947 (T. 2), under the general provisions of the Nationality Act of 1940. (See Appendix.)

On December 9, 1941, the appellant was apprehended and interned as an alien enemy, and was released on parole on December 7, 1943. His parole was terminated on November 15, 1945. (T. 17 and 18.) During the period of his internment he was ques-

tioned by government officers concerning his willingness to bear arms in behalf of the United States. In answer to such questions he then stated that he would not bear arms against Germany, and likewise would not bear arms against Great Britain, and that his objections to such service were not based upon religious grounds. (T. 18.)

At the hearing of his petition for naturalization before the District Court on October 14, 1949, in answer to the question as to his reason for being unwilling to bear arms against either Germany or Great Britain, he testified that before his internment he had always answered that he would bear arms against Germany, but that after he had been interned he then thought that if he continued to answer in the affirmative he would be guilty of treason. He gave the same reason for unwillingness to bear arms against Great Britain. (T. 18 and 19.)

At the Court hearing, in response to the question of his counsel as to whether his refusal to bear arms against either Germany or Great Britain was based upon his apprehension that such a declaration would be not only dishonorable but also possibly a violation of law by which he was bound under antecedent obligations, his answer was "Yes." (T. 20.)

At the hearing the petitioner testified that while interned he had voluntarily assisted in the work of clearing land for artillery ranges for the Army, and had incurred the hostility of other internees by so doing. (T. 21.)

At the conclusion of the Court hearing the Immigration and Naturalization Service, through its duly appointed and authorized Designated Naturalization Examiner, Frances P. Boland, opposed the grant of the petition for naturalization and moved its denial on the ground that the petitioner, by his declaration of unwillingness to bear arms for the United States either against Germany or Great Britain, had indicated his lack of attachment to the principles of the Constitution of the United States, and had failed to show that he was well disposed to the good order and happiness of the United States, as required by Section 307 of the Nationality Act of 1940, under which his petition for naturalization was filed. (T. 22.)

Upon termination of the Court hearing the matter was taken under submission, and an order was thereafter entered by the Court denying the petition on the ground that the petitioner had failed to establish that he had been attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. (T. 9, 12, 22.)

CONTENTIONS OF APPELLANT.

On February 2, 1950, the appellant filed his Concise Statement of Points on which he intended to rely, as follows:

1. The District Court erred in holding that petitioner evidenced lack of attachment to the

principles of the Constitution by stating that he was unwilling to bear arms against countries to which he owed the allegiance of a citizen, until admitted to United States Citizenship.

2. The District Court erred in finding that petitioner's statements were unqualified by such explanation, when made. (T. 32, 33.)

The appellant contends that the District Court lacked the power to hold that his unwillingness to bear arms was a bar to his naturalization, and in support thereof he cites the case of *U. S. v. Siem*, 299 Fed. 582, and the case of *Tutun v. U. S.*, 12 Fed. (2d) 763. (Appellant's brief, pages 10 and 11.)

ARGUMENT.

It is well known that following both the First and Second World Wars a considerable number of aliens who had claimed exemption from military service for the United States upon the ground of alienage, or who had by other means indicated their unwillingness to so serve the United States, thereafter petitioned for naturalization. In the great majority of such cases their petitions have been denied by the Courts on the ground that such acts precluded them from establishing their complete attachment to the principles of the Constitution of the United States and their proper disposition to the good order and happiness of the United States as required by the naturalization laws.

This rule has been applied in the cases of neutral and enemy aliens alike. Since the end of World War II the naturalization Courts have denied many such cases for the same reason.

The *Siem* case cited by the appellant (Appellant's brief, p. 10) is not an authority on the issue of whether such an alien should or should not be granted citizenship, since it was a proceeding brought in the Appellate Court seeking to cancel a Certificate of Naturalization issued out of the District Court, and was based upon the sole contention that the naturalization of such an alien was *illegal*. The suit was brought under Section 15, Act of June 29, 1906, as amended by the Act of May 9, 1918. (See Appendix.) This Section provided only for a direct attack upon the naturalization certificate where it had been procured by either fraud or illegality. Upon this narrow ground the Appellate Court ruled that the action of the trial Court in admitting the petitioner did not go beyond its legal authority, and therefore the naturalization certificate had not been procured by illegality. A quotation from the Court's decision makes this clear:

"In other words, we are not convinced that the mere fact that the applicant has claimed exemption from military service is sufficient in itself, *as a matter of law*, to require cancellation of his certificate of citizenship, regularly granted upon a hearing as to his qualifications under the Naturalization Law." (Italics supplied.)

The appellant might have cited additional cases in which citizenship has been granted despite the claim

of exemption from military service on the ground of alienage; among these being; *Petition of Kohl*, C.C. A. 2d 1945, 146 F. (2d) 347; *Petition of Ajlowny*, D.C. Mich., 1948, 77 F. Supp 327. Cases in which the Courts have held that the naturalization of such aliens may be postponed until at least five years from the time when they expressed unwillingness to bear arms in support of the United States are: *In re Bevelacqua*, 295 F. 862 (D.C. Mass. 1924); *In re Shanin*, 278 F. 739 (D.C. Mass.); *Petition of Escher*, 279 F. 792 (D. C. Tex. 1922); *Hauge v. U.S.*, 276 F. 111 (C.C.A. 9, 1921); *In re Rubin*, 272 F. 697 (D.C. Mich. 1921); *In re Silberschutz*, 269 F. 398 (D.C. Mo. 1920); *In re Tomarchio*, 269 F. 400 (D.C. Mo. 1920); *In re Aldecoa*, D.C. Idaho, 1938, 22 F. Supp. 659; *Labeko v. Carr*, C.C.A. Cal. 1940, 111 F. (2d) 732. A similar case, Petition No. 85732, of Kurt Bendit, a native of Germany, was recently denied for the same reason by Judge Goodman in the U.S. District Court at San Francisco.

An exhaustive review of all the cases of this kind, both reported and unreported, would result in the certain conclusion that the Courts have been deciding the issue in each case upon its own particular merit, since it is evident that an alien's declaration of willingness or unwillingness to bear arms for the United States during a time of national peril—as such act reflects upon his degree of loyalty—must be viewed in the light of all the surrounding circumstances.

Applying the facts of the present case to the appellant's first specification of error (Appellant's

brief, p. 7) he contends, therefore: that the District Court erred in refusing to hold, *as a matter of law*, that this petitioner's declaration of unwillingness to support the United States by force of arms against countries of his former or present allegiance necessarily rebutted any inference of his lack of attachment to the principles of the Constitution of the United States or of his proper disposition toward the good order and happiness of the United States. It is submitted that the great weight of judicial authority does not support his contention, and that the District Court was well within the area of its proper and legal discretion in holding that such a refusal did adversely affect the petitioner's claim to such attachment and such good disposition.

Appellant's second specification of error contends that the District Court also erred in its finding that the petitioner, at the time he declared his refusal to bear arms against both Germany and Great Britain, did not then assign as his reason for such refusal his subsisting citizenship obligations to those countries. (Appellant's brief, p. 2.) In support of this view the appellant sets out that the trial Court erroneously supposed that the appellant unqualifiedly and without any explanation, refused to bear arms against Germany and Great Britain, and he asserts that the record shows the error of that supposition. (Appellant's brief, pages 8 and 9.) He recites the language of the trial Court in its order of December 8, 1949 denying his Motion to Alter the previous order of denial of the petition (T. 28) (Appellant's brief,

p. 14), and a portion of the report and recommendation of the Designated Naturalization Examiner of October 14, 1949, which set out that the petitioner "put his refusal on the grounds that, despite his objections, he had been classified as a German and a potentially dangerous alien enemy. He would not bear arms against Great Britain because it might be treason." (T. 15.) The appellant thinks the word "put" in the Designated Examiner's report refers to the time when appellant made his declaration of unwillingness to perform unqualified military service for the United States, and was coincidental, and in connection with, such declaration.

However, the petitioner had just previously been interrogated by the Designated Examiner with particular regard as to why he had refused to serve against Germany and Great Britain, and it is evident that his report was by way of information to the Court that the petitioner had explained to the Designated Examiner his reason for having made his claim while interned, rather than to any statement that the petitioner had declared his reasons for the claim had been stated *at the time* he had made his previous assertion of unwillingness to serve.

The record of the petitioner's testimony before the trial Court is the best evidence of whether he had given a reason for his refusal at the time of his refusal. At the hearing in Court he testified as follows:

"Q. What was your reason for not being willing to serve against Germany?

A. I must, in order to make myself understood, I must say, before I was interned I was asked on repeated occasions if I was willing to bear arms against Germany and every occasion I answered in the affirmative. But after I was officially classified a German, I was interned for two years as a German National. Then I *thought* if I answered the question in the affirmative I would be guilty of treason.

Q. And what was your reason for not being willing to bear arms against Great Britain?

A. That was also the reason in the case of Great Britain." (T. 18, 19.) (*Italics supplied.*)

In addition, the record discloses the following testimony of the petitioner:

"Q. And then do we understand your refusal to bear arms against Great Britain and Germany at the time you stated you refused to bear arms against them was based upon *apprehension* that such declaration would not only be dishonorable, but possibly a violation of law by which you were bound by under antecedent citizenship obligations?

A. Yes." (T. 20.) (*Italics supplied.*)

It is submitted that nowhere in the record is there evidence to support the contention of the appellant that at the time he made his declaration of refusal he also declared his reasons for doing so.

The District Court in its Order denying the Motion to Alter the Judgment emphasized the testimony of the petitioner with regard to his presently assigned reason for having made his previous declaration of

unwillingness to serve unqualifiedly, and concluded that he was then testifying as to his *state of mind* at the time of his declaration of unwillingness to serve. If the petitioner had meant to testify that, *at the time of his refusal to serve*, he had then assigned a reason for such refusal he could easily have said so, and upon his failure to so testify his counsel could as easily have brought it out.

In the absence of anything in the record to substantiate his present claim that he meant to convey something other than what he testified to—which latter was nothing more than a state of mind as to his “apprehension” and what he “thought”—it is difficult to see how the trial Court could have arrived at any other conclusion than that at the time of his refusal he had not declared his reasons for doing so, and that, as stated by the Court:

“The interpretation he now gives should have been given then if what he then said did not express his attitude.” (T. 27.)

The Courts exercising naturalization jurisdiction are keenly aware that an alien's loyalty is without question the most important consideration in determining whether he should be awarded the high privilege of United States citizenship. A long history of judicial precedents has established the dual principle that the burden of proving his complete worthiness rests upon the alien, and that when any doubt remains in the mind of the Court regarding the petitioner's qualifications such doubt should be resolved

in favor of the government. Citizenship denied can be re-applied for; but once granted cannot be easily revoked:

U. S. v. Schwimmer, Ill. 1929, 279 U.S. 644, 73 L.Ed. 889, reversing C.C.A. 1928, 27 F. (2d) 742;

Allan v. U. S., C.C.A. Cal. 1940, 115 F. (2d) 804;

Estrin v. U.S., C.C.A. N.Y., 1935, 80 F. (2d) 105;

In re Bogunovich, Cal. 1941, 114 P. (2d) 581, prior opinion 106 P. (2d) 247;

Beale v. U. S., C.C.A. Minn. 1934, 71 F. (2d) 737, affirming D.C. 1933, 2 F. Supp. 899;

Petition of Zele, C.C.A., N.Y. 1942, 127 F. (2d) 578;

Petition of Wong Sic Lim, D.C. Cal. 1947, 71 F. Supp. 84;

In re Paoli, D.C. Cal. 1943, 49 F. Supp. 128.

CONCLUSION.

The appellant declares his intention not to challenge the established rules that the burden of proving attachment to the principles of the Constitution is upon one who petitions for naturalization, and that the finding of a trial Court with respect to lack of attachment will seldom be disturbed by an Appellate Court. He asks only that the question of attachment be adjudicated in the light of the true facts and not

upon the basis of an erroneous supposition. (Appellant's brief, p. 16.)

The appellee is in entire accord therewith, and asks that the question of attachment shall be adjudicated in the light of the evidence of record. On such record the appellee firmly believes that the order of the District Court of October 14, 1949, denying the petition for naturalization should be affirmed.

Dated, San Francisco, California,
May 1, 1950.

Respectfully submitted,

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On the Brief.

(Appendix Follows.)

Appendix

Section 307(a) of the Nationality Act of 1940 (8 U.S.C.A. 707(a)), provides as follows:

No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. (54 Stat. 1142; 8 U.S.C. 707.)

Section 15, of the Naturalization Act of June 29, 1906, as amended by Act of May 9, 1918 (34 Stat. 601 and 40 Stat. 544; 8 U.S.C. 405), (repealed effective January 13, 1941, by Section 504 Nationality Act of 1940 (54 Stat. 1173), 8 U.S.C. 904), provided as follows:

Section 15. That it shall be the duty of the United States district attorneys for the respective districts or the Commissioner or Deputy Commissioner of Immigration and Naturalization upon affidavit showing

good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. * * *”.

8 U.S.C.A. 701. Jurisdiction to naturalize:

“(a) Exclusive jurisdiction to naturalize persons as citizens of the United States is hereby conferred upon the following specified courts: District Courts of the United States now existing, or which may hereafter be established by Congress in any State, District Courts of the United States for the Territories of Hawaii and Alaska, and for the District of Columbia and for Puerto Rico, and the District Court of the Virgin Islands of the United States; * * *”.

No. 12,457

IN THE
United States
Court of Appeals
For the Ninth Circuit

KURT ADOLPH TAUCHEN,

Appellant,

VS.

BRUCE G. BARBER, District Director, Im-
migration and Naturalization Service,
San Francisco, California,

Appellee.

Reply Brief on Behalf of Appellant

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MAY 1 - 1950

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IN THE
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Court of Appeals**
For the Ninth Circuit

KURT ADOLPH TAUCHEN,

Appellant,

vs.

BRUCE G. BARBER, District Director, Im-
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San Francisco, California,

Appellee.

Reply Brief on Behalf of Appellant

Appellee's Brief attempts, and fails, to do three things :

1. To deprive this Court of the right to pass upon the merits of the case, by challenging jurisdiction ;
2. To present a picture of the applicable authorities so confused as to define no limits whatever to judicial discretion ; and

3. To rationalize the trial court's misreading of the present Record.

Only the second of these points requires any extended discussion. The others are adverted to only to the extent necessary to avoid any inference that appellee's contentions are unchallenged.

JURISDICTION IS NOT AFFECTED BY THE DESIGNATION OF THE APPELLEE

The jurisdictional point argued by appellee has been argued and submitted for decision by this Court in *Jim Yuen Jung v. Barber, etc.*, No. 12455, but has not been decided at this writing.

It is manifestly insubstantial, because since the abolition of the practice of citation on appeal, appellants have not been required even to name the appellees in their notices of appeal (*Moore's "Federal Practice,"* Section 73.03, p. 3395), and appellant did not. The captioning of the appeal was entirely that of the clerks of the District Court and of this Court.

APPELLEE DOES NOT CITE AUTHORITY FOR THE SCOPE OF JUDICIAL DISCRETION CONTENTED FOR HEREIN

Appellee pointedly omits all discussion of the decision of the Circuit Court of Appeals for the First Circuit in *Tutun v. U. S.*, 12 Fed.(2d) 763 squarely supporting appellant's contention that even the "wide discretion * * * lodged in the judge who hears a petition for naturalization" cannot be exercised to raise as a bar against a petitioner for citizenship, a lawful claim of exemption from military service which Congress has not seen fit to declare disqualifying.

Instead, appellee introduces confusion by the citation of District Court decisions which are clearly obsolete when viewed in the light of later decisions, and by the citation of others wholly irrelevant to the questions presented by this appeal.

Thus, the *Silberschutz* and *Tomarchio* decisions,¹ rendered in 1920, were followed in 1921 by Judge Tuttle's well-reasoned opinion in *In re Miegel*, 272 Fed. 688 citing and discussing these cases and categorically disagreeing with them in a situation which was factually and legally identical.

Similarly, the *Rubin* decision,² in 1921, was followed by Judge Borquin's exhaustive opinion in *In re Siem*, 284 Fed. 868, in 1922, granting citizenship in precisely the same factual and legal situation in which it had earlier been refused.

Again, the *Shanin* and *Escher* decisions, in 1922, and the *Bevelacqua* decision,³ in 1924, were followed by the decision of the Circuit Court of Appeals for the First Circuit in *Tutun v. U. S.*, 12 Fed.(2d) 763 in 1926 in a factually and legally identical situation, and the decision of the Circuit Court of Appeals for the Second Circuit in *Petition of Kohl*, 146 Fed.(2d) 347 in a situation involving the same principles, although factually differentiated by the basing of the claim for exemption from military service on grounds other than alienage.

(1) *In re Silberschutz*, 269 Fed. 398 and *In re Tomarchio*, 269 Fed. 400; Appellee's Brief, page 8.

(2) *In re Rubin*, 272 Fed. 697; Appellee's Brief, page 8.

(3) *In re Shanin*, 278 Fed. 739; *Petition of Escher*, 279 Fed. 792; and *In re Bevelacqua*, 295 Fed. 862; Appellee's Brief, page 8.

Thus was Judge Borquin's sage observation borne out, even in the opinions following his own:

"Incidentally, as the war and its emotions recede, it is interesting to note that the earliest of said decisions denied admission 'with prejudice'; the later, without this futile excommunication; the latest, with express leave to renew; and now is the instant proceeding with its decision granting admission." (284 Fed. at p. 869.)

The *Hauge* decision⁴ of this Court is wholly irrelevant to the questions presented by this appeal. The *Hauge* decision affirmed a conviction for perjury where the appellant had falsely sworn, in his naturalization proceeding, that he had not claimed military exemption on the ground of alienage. Materiality of the fact falsified was clear because a declarant neutral alien could obtain exemption from military service only by withdrawing his declaration and becoming permanently disqualified for citizenship; while a non-declarant neutral alien was not, by law, entitled to exemption. The broad language of the opinion is therefore unnecessary to the decision and must be regarded as dictum.

The *Labeko* decision⁵ of this Court involved a new petition of an applicant who previously had permanently disqualified himself for citizenship by withdrawing his declaration of intention as prescribed by the statute (40 Stat. 884). The decision merely held that the statute meant what it said, i.e., that the applicant could *never* become a citizen because Congress, not the courts, had imposed the disqualification.

(4) *Hauge v. U. S.*, 276 Fed. 111; Appellee's Brief, page 8.

(5) *Labeko v. Carr*, 111 Fed.(2d) 732; Appellee's Brief, page 8.

APPELLEE FAILS TO RATIONALIZE THE TRIAL COURT'S MISREADING OF THE RECORD

Appellee challenges the demonstration, at page 15 of the Brief on Behalf of Appellant, that appellant fully stated the reasons for his actions "while in internment."

The challenge is based upon an assertion that "the petitioner had just previously been interrogated by the Designated Examiner" (Appellee's Brief, page 10), which may or may not be true but is not disclosed by the Record herein.

From this assertion appellee draws the conclusion that the Designated Examiner was reporting, not on what appellant said "while in internment," but on what he said in this unrecorded interrogation.

It is submitted that the Record speaks for itself and must be interpreted without reference to matter *dehors* the record suggested in appellee's brief. The government's officers have at least as great an obligation to make themselves clear as they seek to impose upon appellant. Compare Appellee's Brief, page 12.

CONCLUSION

It is submitted that the weight of authority as evidenced by the cited decisions of the Circuit Courts of Appeal for the First and Second Circuits as well as by the more recent District Court cases cited, shows the bounds of judicial discretion to be clearly defined and to have been exceeded in this case.

The judgment appealed from should therefore be reversed.

Respectfully submitted,

THEODORE H. LASSAGNE,
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In the
Court of Appeals
of the
United States
For the Ninth Circuit

No. 12459

In the Matter of the Application for a Writ of Habeas
Corpus of TOM KING, *Appellant,*

v.

JOHN R. CRANOR, as Superintendent of Washington State
Penitentiary at Walla Walla, Washington, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

FILED

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HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

COUNTER-STATEMENT OF THE CASE

Appellant was charged with the crime of assault in the first degree in Grant County, Washington. Following a general verdict by the jury of guilty upon the assault charge (Tr. 33) a supplemental information was filed charging appellant with being an habitual criminal. After a trial on the habitual criminal charge (Tr. 41-42) a special verdict was found by the jury that appellant was

guilty of being an habitual criminal (Tr. 33). Thereupon the court sentenced appellant to the Washington State Penitentiary for the remainder of his natural life (Tr. 34). Appellant contends that the conviction on the charge of being an habitual criminal is void because the evidence supporting such conviction is insufficient and that the judgment and sentence of life imprisonment was imposed in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution. Appellant contends also that he was compelled to stand trial on the supplemental information of being an habitual criminal without prior notification as to the nature and cause of the accusation against him, in violation of his rights under the Sixth Amendment to the Federal Constitution. Appellant does not attack the trial and conviction on the charge of assault in the first degree.

ARGUMENT

1. Appellant has failed to maintain the burden of proving that his conviction on the charge of being an habitual criminal was a violation of due process.

The minutes of the trial on the habitual criminal charge (Tr. 41, 42, 43) disclose that appellant was present in person and with his attorney and that certified copies of an information, judgment and sentence from Oklahoma and an information, judgment and sentence from Montana were received in evidence. They disclose that further evidence and testimony were admitted and that the jury was instructed by the court. There is nothing in the record indicating that appellant objected to any of this evidence.

The Supreme Court of the United States has held that a presumption of regularity attaches to the judgment of a court, and that while a petitioner who alleges facts setting forth a *prima facie* case for a writ of *habeas corpus* is entitled to an opportunity to be heard, he must prove those allegations. He has the burden of convincing the court by a preponderance of evidence that a judgment against him was made in violation of his constitutional guaranty. See *Johnson v. Zerbst*, 304 U. S. 458, 468, 58 S. Ct. 1019, 1025, 82 L. Ed. 1461, 146 A. L. R. 357; *Foster v. Illinois*, 332 U. S. 134, 137, 67 S. Ct. 1716 1718, 91 L. Ed. 1955. At the hearing upon the petition for a writ of *habeas corpus* in the district court appellant was once more given an opportunity to be heard. Although he was personally present, again he offered nothing in support of his allegations in the pleadings that his conviction on the charge of being an habitual criminal was based on insufficient evidence. He has patently failed to sustain his

burden of proof that such conviction and judgment were in violation of the due process clause of the Federal Constitution.

It is appellant's contention that he was obliged to stand trial on the supplemental information without prior notification as to the nature of the charge against him in violation of the Sixth Amendment. The requirements of the Sixth Amendment are applicable only to Federal courts. In *Foster v. Illinois, supra*, the court said:

"The 'due process' of law which the Fourteenth Amendment exacts from the States is a conception of fundamental justice * * *. It is not satisfied by merely formal procedural correctness nor is it confined by any absolute rule such as that which the Sixth Amendment contains in securing to an accused 'the assistance of counsel for the defense.' By virtue of that provision, counsel must be furnished to an indigent defendant prosecuted in a federal court in every case whatever the circumstances * * *. Prosecutions in state courts are not subject to this fixed requirement. So we have held upon fullest consideration. *Betts v. Brady, supra*. The process of law in order to be 'due' does require that a state give a defendant ample opportunity to meet an accusation. And so, in the circumstances of a 'particular situation' assignment of a counsel may be 'essential to the substance of a hearing' as part of the due process which the Fourteenth Amendment exacts from a State which imposes sentence * * *. Such need may exist whether an accused contests a charge against him or pleads guilty."

The reasoning in the *Foster* case is equally available in the present cause. Notice of the nature and cause of the charge against an accused, and a fair and adequate opportunity for preparation and presentation of his defense is a prerequisite of substantive due process. It is appellee's contention that this prerequisite has been met in the instant situation. So far as notice of the nature and

cause of the charge against appellant is concerned the minutes of the trial on the supplemental information show that the information was read by the prosecuting attorney in the presence of appellant and his attorney and that appellant pleaded not guilty thereto (Tr. 41). In regard to the right of continuance, in *Avery v. Alabama*, 308 U. S. 444, 450, 60 S. Ct. 321, 324, 84 L. Ed. 377, it was held that the trial court's denial of a request by counsel for continuance on the ground of lack of time to prepare a defense was not a denial of the constitutional right to assistance of counsel where counsel failed to show that continuance would have enabled him to present a stronger defense. In the present case there was not even a request for a continuance in spite of the fact, as stated in the affidavit of the prosecuting attorney (Tr. 36), that the question of continuance was discussed after the supplemental information had been filed. Appellant had the benefit of competent counsel who, it must be presumed, would have seasonably objected to an unreasonably summary procedure. In a matter, the knowledge of which was peculiarly within the province of appellant, to wit, the question of his identification as the defendant in the Oklahoma and Montana judgments, appellant chose not to testify. Nor does the record disclose that any objection was made at the trial to testimony submitted in support of the proposition that he was, in fact, the accused in those prior judgments.

Moreover, on the hearing in the district court from which this appeal is directed, appellant failed to offer anything in his pleadings or in evidence beyond his uncorroborated allegations that he had not previously been convicted of felonies. Appellee submits, then, that the

petitioner in a *habeas corpus* proceeding has the burden of proving that his conviction was rendered in violation of the constitution and that appellant here has not sustained that burden.

2. Even if part of the judgment and sentence under authority of which appellant is confined were illegal, appellant is nevertheless deprived of his liberty by virtue of a valid judgment and sentence.

Assuming for this argument that all of appellant's allegations are true, he has failed to state a cause of action for a writ of *habeas corpus* to issue. It is a recognized principle of the law on Judgments that an invalid portion of a judgment, if separable, will be treated as surplusage, and that the remainder shall be effective so far as it was within the power of the court to render.

“ * * * If the void portion of the judgment does not effect the whole with invalidity and may be separated from the remainder and treated as surplusage, the judgment will not be avoided in toto, but will be upheld as to that portion which was within the jurisdiction and power of the court to render * * *.” Freeman on Judgments, Fifth Edition, Volume 1, page 648, § 324.

“On error proceedings it is not always necessary to reverse an improper sentence, for where a part is illegal, the appellate court may, if the sentence is divisible, modify it by striking out the illegal part and affirming the balance.” 15 Am. Jur. 121, Criminal Law, § 463.

Nowhere does appellant complain of his conviction on the charge of assault in the first degree. In fact, appellant claims that the judgment and decree of the Superior Court of the State of Washington for Grant County sentenced him to life imprisonment for the crime of first degree assault (Brief of Appellant, 7). Under Washington law this was a valid judgment and sentence for the crime

of assault in the first degree. Chapter 249, section 161, Laws of 1909 (Rem. Rev. Stat. 2413) provides that a person guilty of assault in the first degree shall be punished by imprisonment in the state penitentiary for not more than five years. Chapter 114, section 2, Laws of 1935 (Rem. Rev. Stat. Supp. 10249-2) provides that when a person is convicted of any felony except treason, murder in the first degree, carnal knowledge of a child under ten years or of being an habitual criminal, the court shall sentence such person to the penitentiary and shall fix a maximum term of such person's sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted if the law provides for a maximum term. *If the law does not provide a maximum term for the crime for which such person was convicted, the court shall fix such maximum term which may be for any number of years up to and including life imprisonment.* Since, therefore, that portion of the judgment which sentences appellant to life imprisonment for the crime of assault in the first degree is valid, the writ of *habeas corpus* is not available. In *McNalley v. Hill*, 293 U. S. 131, 137, 138, 55 S. Ct. 24, 27, 79 L. Ed. 238, a petitioner for a writ of *habeas corpus* who was sentenced on three separate counts, the second and third of which were to run consecutively, assailed the conviction and sentence on the third count as void. On the face of the petition it appeared that his detention was lawful under the sentence on the second count. The court held that there was no occasion in a proceeding in *habeas corpus* for an inquiry into the validity of his conviction and sentence under the third count.

“There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could affect the lawfulness of the custody and detention, and no suggestion of such a use has been found in the commentary on the English common law * * *

“Considerations which have led this Court to hold that habeas corpus may not be used as a writ of error to correct an erroneous judgment of conviction of crime but may be resorted to only where the judgment is void because the court was without jurisdiction to render it (Citations omitted) lead to the like conclusion where the prisoner is lawfully detained under a sentence which is invalid in part. Habeas corpus may not be used to modify or revise the judgment or conviction * * *.”

This principle was repeated in *Eagles v. U. S. ex rel. Samuels*, 329 U. S. 304, 307, 67 S. Ct. 313, 315, 91 L. Ed. 308. Appellee submits that at least the unassailed portion of the trial judgment is sufficient under the laws of the State of Washington and the United States to support a sentence of life imprisonment and that therefore the writ of *habeas corpus* may not be invoked.

CONCLUSION

It is appellee's position that appellant has failed to prove by a preponderance of evidence that his conviction and sentence in the Superior Court of the State of Washington for Grant County was rendered in violation of any personal right guaranteed under the Fourteenth Amendment to the Federal Constitution. It is also appellee's position that even if that portion of the judgment rendered against appellant which adjudges him to be an habitual criminal is unconstitutional and void, the remainder of the judgment and sentence is valid, and appellant may not therefore avail himself of the writ of *habeas corpus* and that the order of the District Court in this case denying appellant's petition for the writ must be affirmed.

Respectfully submitted,

SMITH TROY,

*Attorney General of the
State of Washington,*

LAWRENCE K. McDONELL,

Assistant Attorney General,

Attorneys for Appellee.

No. 12460

United States
Court of Appeals
for the Ninth Circuit.

ROBERT NELSON LANTIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court,
District of Hawaii.

FILED

APR -5 1950

PAUL P. O'BRIEN,
CLERK

No. 12460

United States
Court of Appeals
for the Ninth Circuit.

ROBERT NELSON LANTIS,

Appellant,

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Transcript of Record

Appeal from the United States District Court,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For the Defendant, Robert Nelson Lantis:

DANIEL G. RIDLEY, Esq.,
307 Arcade Building,
Honolulu, T. H.

J. EDWARD COLLINS, Esq.,
Bishop Trust Building,
Honolulu, T. H.

In the United States District Court for the
District of Hawaii

October Term 1948

Cr. No. 10,210

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT NELSON LANTIS,

Defendant.

INDICTMENT

(Count I, Section 88, Title 18, U.S.C.)

(Count II, Section 80, Title 18, U.S.C.)

Count I.

The Grand Jury Charges:

That commencing on or about the 12th day of November, 1946, and continuing thereafter until the 30th day of November, 1946, and at all times during the said period, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Robert Nelson Lantis and Oliver Abreu, hereinafter jointly referred to as the conspirators, did knowingly, wilfully, unlawfully and feloniously conspire, combine, confederate and agree together and with each other, to violate Section 80, Title 18, United States Code, by making and causing to be made, presenting and causing to be presented, to and in a matter within the juris-

diction of the Territorial Surplus Property Office, a branch office of a department and agency of the United States of America, a false and fraudulent application, statement, certificate and representation that one 1941 Willy's Jeep, Engine No. MA-79180, and other property would be purchased by Oliver Abreu, a veteran of World War II, for his own and sole use in his own business and not for the purpose of resale, whereas, in truth and in fact, it was the intent and design of the said conspirators to purchase the said property from the said Territorial Surplus Property Office for the sole use and benefit of the said Robert Nelson Lantis, who was not then and there a veteran of World War II and therefore, was not entitled to the benefit of the VP-2 Veteran's priority privilege under which the application for and purchase of the said property would be made as aforesaid, as the conspirators then and there well knew.

Thereafter, and in pursuance of said conspiracy and to effect the objects thereof, the conspirators did do and commit, among others, the following overt acts;

(1) On or about the 12th day of November, 1946, in the City and County of Honolulu, Territory of Hawaii, the said Robert Nelson Lantis and Oliver Abreu did meet and confer.

(2) On or about the 12th day of November, 1946, in the City and County of Honolulu, Territory of Hawaii, the said Robert Nelson Lantis and Oliver Abreu did make and present to the said Territorial

Surplus Property Office an application for the purchase of one 1941 Willy's Jeep, Engine No. MA-79180, and other property.

(3) On or about the 18th day of November, 1946, in the City and County of Honolulu, Territory of Hawaii, the said Robert Nelson Lantis and Oliver Abreu, did pay to the Territorial Surplus Property Office, aforesaid, the sum of \$325.00.

Count II.

The Grand Jury Further Charges:

That on or about the 12th day of November, 1946, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Robert Nelson Lantis knowingly and wilfully made, and caused to be made and aided and abetted in making a false and fraudulent statement and representation and knowingly and wilfully presented and caused to be presented and aided and abetted in presenting to and in a matter within the jurisdiction of the Territorial Surplus Property Office, a branch office of a department and agency of the United States of America, a false and fraudulent statement and representation, to wit: that one 1941 Willy's Jeep, Engine No. MA-79180, and other property would be purchased by Oliver Abreu, a veteran of World War II, for his own and sole use in his own business and not for the purpose of resale, whereas, in truth and in fact, it was the intent and design of the said Oliver Abreu, and defendant

to purchase the said property from the said Territorial Surplus Property Office for the sole use and benefit of the said Robert Nelson Lantis, who was not then and there a veteran of World War II and therefore, was not entitled to the benefit of the VP-2 Veteran's priority privilege under which the application for and purchase of the said property would be made as aforesaid, as the defendant and said Oliver Abreu, then and there well knew.

Dated: Honolulu, T. H., this 23rd day of March, 1949.

A True Bill.

/s/ CECIL G. BENNY,

Foreman, Grand Jury.

/s/ RAY J. O'BRIEN,

United States Attorney.

I hereby order a Bench Warrant to issue forthwith on the within Indictment for the arrest of the defendant named therein, bail being fixed at \$2,000.

/s/ D. E. METZGER,

Judge, United States District Court for the District of Hawaii.

Presented in open Court by the Grand Jury on Mar. 23, 1949.

/s/ [Indistinguishable]

Deputy Clerk.

[Endorsed]: Filed Mar. 23, 1949.

[Title of Court and Cause.]

FROM THE MINUTES OF
THURSDAY, OCTOBER 4, 1949

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant herein with Mr. Daniel G. Ridley, his counsel. This case was called for trial, jury waived.

Opening statements were made by Mr. Hoddick and Mr. Ridley.

Mr. Oliver Abreu, automobile mechanic, was called and sworn and testified on behalf of the United States.

Copy of Veteran's Application for Surplus Property and Certificate were marked for identification as United States "A" and were admitted in evidence as United States Exhibit No. 1, marked and ordered filed.

Copy of Veteran's Purchase Order was admitted in evidence as United States Exhibit No. 2, marked and ordered filed.

Copy of Surplus Property Office Notice of Sale, etc., were admitted in evidence as United States Exhibit No. 3, marked and ordered filed.

Application for Registration of Passenger Carrying Motor Vehicle was marked for identification as United States "B-1."

Motor Vehicle Certificate of Legal Ownership was marked for identification as United States "B-2."

Motor Vehicle Certificate of Legal Ownership was marked for identification as United States "B-3."

Surplus Property Office Notice of Sale was marked for identification as United States "C."

United States "B-1," "B-2," and "B-3" for identification were admitted in evidence as United States Exhibits Nos. 4-A, 4-B, and 4-C, marked and ordered filed.

United States "C" for identification was admitted in evidence as United States Exhibit No. 5, marked and ordered filed.

At 10:49 a.m., the government rested its case.

Mr. Robert Nelson Lantis, defendant herein, was called and sworn and testified on his own behalf.

At 11:20 a.m., the defendant rested.

The Court ordered that this case be continued to 2 p.m., this day for further trial.

At 2:10 p.m., upon request of Mr. Hoddick, the Court ordered that this case be further continued to 2:30 p.m. for further trial.

At 2:36 p.m., Mr. Anthony W. Cambra, employee, Mutual Telephone Company, was called and sworn and testified on behalf of the United States.

At 2:50 p.m., both sides rested.

Opening argument was waived by the government, and argument was had by Mr. Ridley.

At 3 p.m., closing argument was had by Mr. Hoddick.

At 3:08 p.m., this case was submitted.

At 3:20 p.m., upon the evidence adduced, the Court found the defendant guilty as to Counts I and II of the Indictment herein.

Exceptions to the Court's findings were noted by the defendant.

The Court then ordered that this case be continued to October 14, 1949 at 10 a.m. for pre-sentence investigation and for sentence.

District Court of the United States
for the District of Hawaii

Cr. No. 10,210

UNITED STATES OF AMERICA

vs.

ROBERT NELSON LANTIS

(Count I, Sec. 88, Title 18, U.S.C.)

(Count II, Sec. 80, Title 18, U.S.C.)

JUDGMENT AND COMMITMENT

On this 21st day of October, 1949 came the attorney for the government and the defendant appeared in person and with his counsel, Daniel G. Ridley, Esquire, and Herbert H. K. Lee, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty as to both Counts and a finding of guilty of the offenses of knowingly, wilfully, unlawfully and feloniously making and causing to be made false, fraudulent and misleading statements and certificates upon application to purchase war surplus materials from the Territorial Surplus Property Office, a branch office of a department and agency of the United States of America,

and of conspiring to have such false statements made, as charged in Counts I and II and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year and One (1) Day as to Count I and fined the sum of One Thousand and no/100 Dollars (\$1,000.00) as to Count II.

It is further ordered:

That Mittimus be stayed to November 25, 1949 at 11:00 a.m.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ D. E. METZGER,

United States District Judge.

/s/ WM. F. THOMPSON, JR.,

Clerk.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

The Defendant moves the court to grant him a new trial for the following reasons:

1. That since October 4, 1949 (the date on which the Defendant was tried and found guilty by the court), Defendant has ascertained that one Mario P. Cortese will testify to the facts set forth in the affidavit of the said Mario P. Cortese hereto attached and marked Exhibit "A."

2. That since October 4, 1949, the Defendant has discovered that there are certain books, papers and other documents in existence which would establish that that certain Willys jeep mentioned in the indictment was purchased by Oliver Abreu (the veteran named in said indictment) for his own personal use and not for re-sale.

3. That the court erred in finding and adjudicating the Defendant guilty on each count in the indictment upon the unsupported testimony of Oliver Abreu, an alleged co-conspirator.

4. That the finding and judgment of the court as to the Defendant's guilt in reference to both counts set forth in the indictment is contrary to the weight of the evidence.

5. That the finding and judgment of the court

as to Defendant's guilt in reference to both counts set forth in the indictment is not supported by substantial evidence.

Dated: Honolulu, T. H., this 31st day of October, 1949.

/s/ HERBERT K. H. LEE,
Attorney for Defendant.

/s/ DANIEL G. RIDLEY,
Attorney for Defendant.

EXHIBIT A

[Title of District Court and Cause.]

Affidavit

Territory of Hawaii,
City and County of Honolulu—ss.

Mario P. Cortese, being first duly sworn on oath, deposes and says: That he resides at 1516-H Nehoa Street, Honolulu, City and County of Honolulu, Territory of Hawaii; that during the months of November and December, 1946, and January, February and March, 1947, he was employed by Lantis Motors, Limited, a Hawaiian corporation; that during said period, he was employed as shop foreman at the place of business of said Lantis Motors, Limited, at 800 South Beretania Street, said Honolulu; that, as such shop foreman, he supervised and kept the time sheets or cards covering the number of hours of work each day by each employee of

Lantis Motors, Limited; that, as such shop foreman, he supervised and kept the time sheet or card covering the hours of work each day by an employee mechanic of Lantis Motors, Limited, named Oliver Abreu; that said Oliver Abreu was employed by said Lantis Motors, Limited, during the months of November and December, 1946, and January, February and March, 1947; that during the latter part of November, 1946, affiant was present at the aforesaid place of business of Lantis Motors, Limited, when the said Oliver Abreu towed onto the premises where said place of business was located, a certain 1941 Willys jeep; that the motor on said jeep was "frozen"; that thereafter, said Oliver Abreu commenced repair work on said jeep; that, as part of his duties, affiant had occasion to check as to whether the time spent by the said Oliver Abreu in the repairing of said jeep was company time; that affiant ascertained that the said Oliver Abreu was repairing said jeep on his own time; that accordingly, affiant did not include the time spent by the said Oliver Abreu in repairing said jeep as part of the time charged to Lantis Motors, Limited; that the said Oliver Abreu worked on said jeep on various occasions after working hours and on Sundays and holidays; that affiant was present on various occasions after working hours and on Sundays and holidays while the said Oliver Abreu was repairing said jeep; that the reason affiant had occasion to be present on said occasions was because at times some

of the employees worked overtime, and it was his duty to check on said overtime; that the said Oliver Abreu worked on said jeep on various occasions after working hours and on Sundays and holidays during the months of December, 1946, and January, February and March, 1947; that it was common knowledge around the shop at Lantis Motors, Limited, that said jeep belonged to the said Oliver Abreu, and that he, the said Oliver Abreu, was repairing the same on his own time; that at no time during the aforesaid period of time (December, 1946, and January, February and March, 1947) did anyone connected with Lantis Motors, Limited, suggest to affiant that said jeep was owned by anyone other than the said Oliver Abreu; that during the aforesaid period of time, Robert N. Lantis was the president and manager of said Lantis Motors, Limited, and at no time during the said period of time did the said Robert N. Lantis ever suggest to affiant that said jeep belonged to him, the said Robert N. Lantis; that, on the contrary, and during the month of December, 1946, when affiant first had occasion to make a check in his capacity as timekeeper, the said Robert N. Lantis informed affiant that said jeep belonged to the said Oliver Abreu and was being repaired by the said Oliver Abreu on the latter's own time.

And further affiant sayeth not.

Dated: Honolulu, T. H., this 28th day of October, 1949.

/s/ MARIO P. CORTESE.

Subscribed and sworn to before me this 28th day of October, 1949.

[Seal] /s/ T. OKADA,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires: July 21, 1953.

EXHIBIT B

[Title of District Court and Cause.]

Affidavit

Robert Nelson Lantis, being first duly sworn on oath, deposes and says: That he is the Defendant herein; that since he was served with the indictment herein, he has made diligent effort and inquiry to determine the names of persons who might have knowledge of the transaction involving the purchase and subsequent use of the Willys jeep mentioned in said indictment, as well as knowledge as to its ownership following its purchase in November, 1946; that, in that said transaction occurred in November, 1946, and over two years prior to the filing of the indictment herein, at a time when Defendant was connected with Lantis Motors, Limited, a Hawaiian corporation (which said Lantis Motors, Limited, went out of business in September, 1949), Defendant, up to the time of trial on October 4, 1949, was unable to locate any witness who had any recollection of and concerning the purchase of said jeep and its ownership thereafter; that following his trial

and conviction on October 4, 1949, Defendant was contacted by one Mario P. Cortese; that, after several discussions with the said Cortese, Defendant discovered that the said Cortese remembered the transaction involving the purchase of said jeep and also had certain knowledge of and concerning said jeep following its purchase; that thereafter, Defendant brought said Mario P. Cortese to the office of his attorney, Daniel G. Ridley, who obtained the affidavit of the said Mario P. Cortese pertaining to facts within the knowledge of said Cortese and involving said jeep; that prior to the aforesaid time the said Cortese contacted the Defendant, Defendant had no reason based upon recollection to suspect that the said Cortese might know anything about the said purchase of said jeep or its subsequent use or ownership; that since September, 1947, Defendant has not had access to the books or other papers or documents belonging to the said Lantis Motors, Limited, and has, therefore, not been in a position to check the records to ascertain who, in the employ of Lantis Motors, Limited, during the latter part of 1946 and in the early part of 1947, might have knowledge of and concerning the transaction involving the purchase of said jeep or its subsequent use or ownership; that, as far as Defendant knows, all of said books and records have been in the possession of one Jack W. Russell who was the secretary of said Lantis Motors, Limited, and the said Jack W. Russell has, since September, 1947, refused the Defendant access to said books and records; that

during a conversation between the Defendant and the said Jack W. Russell on October 31, 1949, the said Jack W. Russell admitted to Defendant that he, the said Jack W. Russell, had in his possession a receipt and other documentary evidence which would establish the fact that during the latter part of 1946, Defendant loaned to the said Oliver Abreu the sum of \$325.00 to purchase the aforesaid Willys jeep, and that the said jeep was for the said Oliver Abreu's own use.

Further affiant sayeth not except that this affidavit is in support of the aforesaid Motion for a New Trial.

Dated: Honolulu, T. H., this 31st day of October, 1949.

/s/ ROBERT LANTIS.

Subscribed and sworn to before me this 31st day of October, 1949.

[Seal] /s/ WILLIAM H. KAM,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires: June 30, 1953.

EXHIBIT C

[Title of District Court and Cause.]

Affidavit

Daniel G. Ridley, being first duly sworn on oath, deposes and says: That he is one of the attorneys for the Defendant, Robert Nelson Lantis; that as

such attorney, he represented said Defendant at the trial of the above entitled matter on October 4, 1949; that prior to said trial, affiant did not know of the witness, Mario P. Cortese, or as to what he would testify to; that prior to said trial and until recently so informed, affiant did not know that there was any other documentary evidence involving that certain Willys jeep referred to in the indictment herein, other than the documentary evidence submitted at the time of the trial.

Further affiant sayeth not except that this affidavit is in support of the aforesaid Motion for a New Trial.

Dated: Honolulu, T. H., this 31st day of October, 1949.

/s/ DANIEL G. RIDLEY.

Subscribed and sworn to before me this 31st day of October, 1949.

[Seal] /s/ WILLIAM H. KAM,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

My commission expires: June 30, 1953.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 31, 1949.

[Title of Court and Cause.]

FROM THE MINUTES OF WEDNESDAY,
DECEMBER 7, 1949

On this day came Mr. Howard K. Hoddick, Assistant United States District Attorney, and also came the defendant herein with Mr. Daniel G. Ridley, his counsel. This case was called for hearing on motion for a new trial.

Motion by Mr. Hoddick that paragraphs 3, 4, and 5 of said motion be not granted, not having been timely filed, was granted by the Court.

Argument was then had by respective counsel.

At 10:35 a.m., Mr. Albert Grain, court reporter, was summoned by the Court to read the testimony of the witness Abreu at the trial of this case.

Thereafter, the Court denied the motion for a new trial. Exceptions to the Court's ruling were noted by the defendant.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The Defendant above named appeals from the Judgment of the Honorable Delbert E. Metzger entered in the above entitled Court and cause on the 4th day of October, 1949.

Name and Address of Appellant: Robert Nelson Lantis, 239-A Beach Walk, Honolulu, T. H.

Name and Address of Appellant's Attorneys: J.

Edward Collins, Bishop Trust Building, Honolulu, T. H., Daniel G. Ridley, 307 Arcade Building, Honolulu, T. H.

Offenses: Count I: Conspiracy to violate Section 80, Title 18, United States Code, by making and causing to be made, presenting and causing to be presented, to and in a matter within the jurisdiction of the Territorial Surplus Property Office, a branch office of a department and agency of the United States of America, a false and fraudulent application, statement, certificate and representation that one 1941 Willy's jeep, Engine No. MA-79180, and other property would be purchased by Oliver Abreu, a veteran of World War II, for his own and sole use in his own business and not for the purpose of resale. Count II: Knowingly and wilfully made, and cause to be made and aided and abetted in making a false and fraudulent statement and representation and knowingly and wilfully presented and caused to be presented and aided and abetted in presenting to and in a matter within the jurisdiction of the Territorial Surplus Property Office, a branch office of a department and agency of the United States of America, a false and fraudulent statement and representation, to wit: that one 1941 Willy's jeep, Engine No. MA-79180, and other property would be purchased by Oliver Abreu, a veteran of World War II, for his own and sole use in his own business and not for the purpose of resale.

Date of Judgment: October 4, 1949.

Brief Description of Judgment or Sentence: The

Defendant, having been adjudged guilty on each of the foresaid counts set forth in the indictment, was sentenced to imprisonment for one year and one day on the first count, and was sentenced to pay a fine of \$1,000 on the second count.

Name of Prison Where Now Confined: None—bail posted.

I, the above named Defendant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment above mentioned.

Dated: Honolulu, T. H., this 15th day of December, 1949.

/s/ ROBERT NELSON LANTIS,
Appellant.

[Endorsed]: Filed Dec. 15, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The Defendant above named appeals from the Order of the Honorable Delbert E. Metzger heretofore entered herein on the 7th day of December, 1949, and denying Defendant's Motion for a New Trial.

Name and Address of Appellant: Robert Nelson Lantis, 239-A Beach Walk, Honolulu, T. H.

Name and Address of Appellant's Attorneys: J. Edward Collins, Bishop Trust Building, Honolulu, T. H., Daniel G. Ridley, 307 Arcade Building, Honolulu, T. H.

Offenses: Count I: Conspiracy to violate Section

80, Title 18, United States Code, by making and causing to be made, presenting and causing to be presented, to and in a matter within the jurisdiction of the Territorial Surplus Property Office, a branch office of a department and agency of the United States of America, a false and fraudulent application, statement, certificate and representation that one 1941 Willy's Jeep, Engine No. MA-79180, and other property would be purchased by Oliver Abreu, a veteran of World War II, for his own and sole use in his own business and not for the purpose of resale. Count II: Knowingly and wilfully made, and caused to be made and aided and abetted in making a false and fraudulent statement and representation and knowingly and wilfully presented and caused to be presented and aided and abetted in presenting to and in a matter within the jurisdiction of the Territorial Surplus Property Office, a branch office of a department and agency of the United States of America, a false and fraudulent statement and representation, to wit: that one 1941 Willy's Jeep, Engine No. MA-79180, and other property would be purchased by Oliver Abreu, a veteran of World War II, for his own and sole use in his own business and not for the purpose of resale.

Date of Judgment: October 4, 1949.

Date of Order Denying Motion for a New Trial: December 7, 1949.

Brief Description of Judgment and Sentence: The Defendant, having been adjudged guilty on each

of the aforesaid counts set forth in the indictment, was sentenced to imprisonment for one year and one day on the first count, and was sentenced to pay a fine of \$1,000 on the second count.

Brief Description of Order Denying Motion for a New Trial: Motion for a New Trial denied on the ground that the newly discovered evidence would not have changed the Court's judgment.

Name of Prison Where Now Confined: None—bail posted.

I, the above named Defendant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above mentioned Order denying my motion for a new trial.

Dated: Honolulu, T. H., this 15th day of December, 1949.

/s/ ROBERT NELSON LANTIS,
Appellant.

[Endorsed]: Filed Dec. 15, 1949.

[Title of District Court and Cause.]

ELECTION

Comes now Robert Nelson Lantis, Defendant above named, and hereby elects not to commence service of the sentence of imprisonment heretofore imposed upon him in the above entitled Court and cause.

Dated: Honolulu, T. H., this 15th day of December, 1949.

/s/ ROBERT NELSON LANTIS.

[Endorsed]: Filed Dec. 15, 1949.

[Title of District Court and Cause.]

APPLICATION FOR BAIL

Comes now Robert Nelson Lantis, Defendant above named, and hereby makes application that he may be admitted to bail upon such terms as the Court may prescribe in accordance with Rule 38 of the criminal proceedings relating to the District Courts of the United States of America.

Dated: Honolulu, T. H., this 15th day of December, 1949.

/s/ ROBERT NELSON LANTIS.

[Endorsed]: Filed Dec. 15, 1949.

[Title of District Court and Cause.]

BOND

Know All Men By These Presents:

That we, Robert Nelson Lantis, as Principal, and Fong Hing and Lizzie Fong Hing, as Sureties, are held and firmly bound unto the United States of America in the Full Sum of \$2,000.00 for the payment of which well and truly to be made, we do bind ourselves, our executors and administrators, jointly and severally by these presents,

Whereas, lately, in the District Court for the United States in and for the District and Territory of Hawaii, judgment, sentence and fine were made and entered against Robert Nelson Lantis, Defendant above named, and

Whereas, notice has been given of appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to secure a reversal of said judgment, sentence and fine, and

Whereas, the Honorable Delbert E. Metzger, Judge of said District Court, did regularly order that a supersedeas and bail bond be given in the sum of \$2,000.00 pending said appeal,

Now, Therefore, the condition of the above obligation is such that if the said Robert Nelson Lantis shall appear here in person or by attorney in the United States Court of Appeals for the Ninth Judicial Circuit on such day or days as may be appointed for the hearing of said cause in said Circuit Court

and prosecute his appeal and shall abide by and obey all orders made by said Circuit Court in said cause, and shall pay any fine, damages and all costs imposed by the judgment of said District Court against him, and shall surrender himself in execution of the judgment, sentence and fine appealed from as said Circuit Court may direct, if the judgment, sentence and fine against him shall be affirmed or the appeal dismissed; and if he shall appear for trial in said District Court on such day or days as may be appointed for a retrial of said cause and abide by and obey all the orders made by said District Court, provided the judgment, sentence and fine made against him shall be reversed by said Circuit Court, then the above obligation shall be void, otherwise to remain in full force, effect and virtue.

In Witness Whereof, the above bounden Principal and Sureties have hereunto affixed their hands this 16th day of December, 1949.

/s/ ROBERT NELSON LANTIS,
Principal.

/s/ FONG HING,
Surety.

/s/ LIZZIE FONG HING,
Surety.

Taken and acknowledged before me this 16th day of December, 1949.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, U. S. District Court.

Territory of Hawaii,
City and County of Honolulu—ss.

Fong Hing, being first duly sworn on oath, deposes and says that he is the Fong Hing named as a Surety and who filed the foregoing Bond and that he is worth the sum of \$4,000.00 over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ FONG HING.

Subscribed and sworn to before me this 16th day of December, 1949.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, Territory of
Hawaii.

Territory of Hawaii,
City and County of Honolulu—ss.

Lizzie Fong Hing, being first duly sworn on oath, deposes and says that she is the Lizzie Fong Hing named as a Surety and who filed the foregoing Bond and that she is worth the sum of \$4,000.00 over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ LIZZIE FONG HING.

Subscribed and sworn to before me this 16th day of December, 1949.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, Territory of
Hawaii.

Approved as to Form:

/s/ HOWARD K. HODDICK,
Ass't U. S. Attorney.

Approved as to the Amount and Sufficiency of
Surety:

/s/ D. E. METZGER,
Judge, U. S. District Court.

[Endorsed]: Filed Dec. 16, 1949.

[Title of District Court and Cause.]

COST BOND

Know All Men By These Presents:

That we, Robert Nelson Lantis, as Principal, and Mario P. Cortese and Thomas E. Miller, as Sureties, are held and firmly bound unto the United States of America in the Full Sum of \$250.00 for the payment of which well and truly to be made, we do bind ourselves, our executors and administrators, jointly and severally by these presents,

Whereas, lately, in the District Court for the United States in and for the District and Territory of Hawaii, judgment, sentence and fine were made and entered against Robert Nelson Lantis, Defendant above named, and

Whereas, notice has been given of appeal to the United States Court of Appeals for the Ninth Judicial Circuit, to secure a reversal of said judgment, sentence and fine,

Now, Therefore, the condition of the above obligation is such that if the said Robert Nelson Lantis shall prosecute his appeal with effect, and shall answer all costs if he fails to make good his appeal, then this obligation shall be void; otherwise to remain in full force, effect and virtue.

In Witness Whereof, the above bounden Principal and Sureties have hereunto affixed their hands this 17th day of January, 1950.

/s/ ROBERT N. LANTIS,
Principal.

/s/ MARIO P. CORTESE,
Surety.

/s/ THOMAS E. MILLER,
Surety.

Taken and acknowledged before me this 17th day of January, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, U. S. District Court.

Territory of Hawaii,
City and County of Honolulu—ss.

Mario P. Cortese, being first duly sworn on oath, deposes and says that he is the Mario P. Cortese named as a Surety and who filed the foregoing Bond and that he is worth the sum of \$500.00 over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ MARIO P. CORTESE.

Subscribed and sworn to before me this 17th day of January, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, Territory of
Hawaii.

Territory of Hawaii,
City and County of Honolulu—ss.

Thomas E. Miller, being first duly sworn on oath, deposes and says that he is the Thomas E. Miller named as a Surety and who filed the foregoing Bond and that he is worth the sum of \$500.00 over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

/s/ THOMAS E. MILLER.

Subscribed and sworn to before me this 17th day of January, 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, Territory of
Hawaii.

Approved as to Form:

/s/ HOWARD K. HODDICK,
U. S. Attorney.

Approved as to the Amount and Sufficiency of
Surety:

/s/ D. E. METZGER,
Judge, U. S. District Court.

[Endorsed]: Filed Jan. 17, 1950.

[Title of District Court and Cause.]

DEFENDANT - APPELLANT'S SECOND
AMENDED DESIGNATION OF RECORD

The Defendant-Appellant, Robert Nelson Lantis, designates the following to be included in the record of appeal:

1. The indictment against Defendant.
2. Clerk's minutes of October 4, 1949 (the date of the trial).
3. Official reporter's transcript of evidence taken and proceedings had during the trial.
4. All exhibits.
5. The judgment, commitment and sentence of the court.
6. Defendant's motion for a new trial and affidavits attached thereto.
7. Clerk's minutes of December 7, 1949 (the date of hearing on motion for a new trial).
8. Official reporter's transcript of hearing on motion for a new trial.
9. Oral order denying motion for a new trial entered December 7, 1949 (included in clerk's minutes).
10. Notice of appeal (from the judgment of the court) filed December 15, 1949.

11. Notice of appeal (from the order denying Defendant's motion for a new trial) filed December 15, 1949.

12. Election (not to commence service of sentence of imprisonment) filed December 15, 1949.

13. Application for bail filed December 15, 1949.

14. Bail Bond filed December 16, 1949.

15. Bond for costs filed January 17, 1950.

16. This designation.

Dated: Honolulu, T. H., this 17th day of January, 1950.

ROBERT NELSON LANTIS,
Defendant-Appellant.

By /s/ J. EDWARD COLLINS,

/s/ DANIEL G. RIDLEY,
Attorneys for Defendant-
Appellant.

[Endorsed]: Filed Jan. 17, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii,

do hereby certify that the foregoing record on appeal in the above-entitled cause, consists of the following listed original pleadings, reporter's transcripts, and exhibits of record in said cause:

Indictment

Judgment and Commitment

Motion for a New Trial and Affidavits

Notice of Appeal (from the judgment of the court)

Notice of Appeal (from the order denying motion for new trial)

Election

Application for Bail

Bond

Cost Bond

Defendant-Appellant's Second Amended Designation of Record

Transcript of Proceedings (October 4, 1949)

Transcript of Proceedings (December 7, 1949)

United States Exhibits Nos. 1, 2, 3, 4-A, 4-B, 4-C, and 5.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of January, A.D. 1950.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District Court, District of
Hawaii.

In the United States District Court for the
Territory of Hawaii

Criminal No. 10,210

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT NELSON LANTIS,

Defendant.

TRANSCRIPT OF PROCEEDINGS

October 4, 1949, at 9:15 a.m.

Before: Hon. Delbert E. Metzger,
Judge.

Appearances:

HOWARD K. HODDICK, ESQ.,
Assistant United States Attorney,
appearing for Plaintiff;

DANIEL G. RIDLEY, ESQ.,
appearing for Defendant.

PROCEEDINGS

The Clerk: Criminal No. 10,210, United States
of America versus Robert Nelson Lantis, for trial.
There was filed on October 1st a waiver of jury.

The Court: All right.

Mr. Hoddick: May it please the Court, the in-
dictment in this case charges the defendant, Robert

Nelson Lantis, with having conspired with one Oliver Abreu to violate Section 80, Title 18, U. S. Code. This is in connection with the purchase of surplus property. It is a conspiracy to submit a false statement contrary to law, and then the actual submission of the false statement and representation as the violation is set forth in the second count of the indictment.

We will introduce evidence showing that the veteran Oliver Abreu was employed by the defendant Lantis during the year 1946; that in September of 1946 Lantis came to Abreu and asked him if he was a veteran and if he would purchase some surplus vehicles for him; and that Abreu indicated that he would. Lantis took him down to the surplus property office and assisted him in filling out certain application forms. Approximately two months later Lantis gave to Abreu a blank purchase order and had Abreu sign it. The following day, or a couple of days thereafter, Lantis took Abreu down [2*] to the surplus property office and the purchase order, in which a request for jeeps had been filled in, had been accepted by the surplus property office. They had the jeeps available. Lantis gave to Abreu \$325 and Abreu turned it over to the surplus property office. Abreu at that time signed the bill of sale on which he indicated that he was purchasing it for his own use, not for resale. And several days thereafter they went out to Iroquois Point and picked up that jeep and another, other jeeps, that Lantis had

* Page numbering appearing at top of page of original Reporter's Transcript.

purchased, and they then went down to the Territorial Motor Vehicle Department and the jeep was registered in Abreu's name, showing Lantis as the legal owner. And some time later the title to the jeep was actually transferred to Lantis.

At no time did Abreu have any use of the jeep or did he buy it for his own use. He purchased it for Lantis who was his employer. And this transaction arose out of the employer-employee relationship. Abreu was never compensated for buying the jeep for Lantis.

Our first witness, unless Mr. Ridley cares to make an opening statement——

Mr. Ridley: Just a short one, if your Honor please. We will show, and it is our contention to show by the evidence, that this was purely a loan transaction. There was never any purchase of this car for Mr. Lantis' use. The car was purchased for Mr. Abreu's use. He did in fact use it and [3] repaired it, and the fact that it was put in Lantis' name as legal owner was by way of security for monies loaned to Mr. Abreu, advanced by Mr. Lantis in order that he might buy it under his veteran's priority. That is in brief what we will show, if your Honor please.

The Court: All right. Proceed.

Mr. Hoddick: Call Oliver Abreu.

OLIVER ABREU

a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

The Court: How old are you?

The Witness: Twenty-eight.

The Court: Twenty?

The Witness: Twenty-eight.

Q. (By Mr. Hoddick): Will you give your full name, please? A. Oliver Abreu, A-b-r-e-u.

Q. And, Mr. Abreu, will you speak loud enough so that both Mr. Ridley and myself can hear you. Are you a veteran of World War II?

A. Yes, sir.

Q. And in what part of the Armed Services did you serve? A. Quartermaster. [4]

Q. You were with the U. S. Army?

A. U. S. Army, yes.

Q. How long were you in the service?

A. Eleven months.

Q. During what period of time?

A. Forty-six September to November '47.

Q. You say '46 when?

A. September I went in, in September.

Q. Could that be September '45?

A. Yes, that's right.

Q. And how long did you serve, eleven months?

A. Yes.

Q. Until? A. Until '46, November.

Q. Until August of '46?

(Testimony of Oliver Abreu.)

The Court: I thought he said November. You say August.

Mr. Hoddick: Well, he said he was in eleven months.

The Court: Yes, I know. He said November. You say August.

Q. Mr. Abreu, do you remember when you were discharged from the Army?

A. I think it is in November '46.

Q. Where did you go to work after you were discharged from the Army?

A. Lantis Motors. [5]

Q. Lantis Motors? A. That's right.

Q. And what did you do at Lantis Motors? What was your job there?

A. Auto mechanic.

Q. That was the only work you did, repairing automobiles? A. That's right.

Q. Have you ever purchased any surplus property? A. That's right.

Q. And what kind of surplus property did you buy? A. Jeep.

Q. A jeep? What led you to purchase this jeep? Why did you purchase the jeep?

A. Mr. Lantis asked me to.

Q. Well, now, will you tell the Court and tell me what Mr. Lantis said when he asked you to buy the jeep?

A. First he asked me if I was a veteran. I told

(Testimony of Oliver Abreu.)

him yes. And he asked me if I'd get him a vehicle from the Army. I told him O.K.

Q. Did he say what kind of a vehicle he wanted you to get?

A. Yes, he wanted a sedan or a station wagon at first.

Q. And after he asked you about that, what did you say? Did you tell him you would? [6]

A. Yes.

Q. Did you and Mr. Lantis ever go down to the surplus property office? A. Yes, sir.

Q. Was that shortly after he asked you if you would buy him a station wagon or a sedan?

A. Yes.

Q. And what did you do when you got in the surplus property office?

A. We filled out an application; took me down there and we came back and I started working again.

Q. Did you fill out the application in your own handwriting? A. Yes, sir.

Q. Had you ever filled out one of those applications before? A. No.

Q. Did you know how to fill it out?

A. No, I didn't.

Q. Who helped you? A. Mr. Lantis.

Q. He was standing beside you when you filled it out? A. Yes, sir.

Mr. Hoddick: Will you mark this for identification purposes? (Handing a document to the Clerk.)

(Testimony of Oliver Abreu.)

The Clerk: U. S. Exhibit "A" for identification.

(The document referred to was marked
"U. S. Exhibit A for Identification.")

Mr. Hoddick: U. S. "A" for identification purposes is a veteran's application for surplus property, dated September 20, 1946. Attached to it is a document entitled "Certificate No. 10321," also dated September 20, 1946. (Handing documents to Mr. Ridley.)

Q. Mr. Abreu, I show you document marked "U. S. Exhibit A for Identification" and ask you if this is the application that you filled out the first time that you went down to the surplus property office with Mr. Lantis? (Handing document to the witness.) A. Yes, sir.

Q. And that is the application that Mr. Lantis assisted you in filling out? A. That's right.

Q. And this is your signature on the page attached to it? A. Yes, sir.

Mr. Hoddick: I'd like to offer these in evidence, your Honor. (Handing exhibits to the Court.)

The Court: Any objection?

Mr. Ridley: No objection.

The Court: This is an application and a certificate. [8] Is this your handwriting on it?

The Witness: Yes, sir.

The Clerk: U. S. Exhibit No. 1.

(Testimony of Oliver Abreu.)

(The document previously marked "U. S. Exhibit A for Identification" was received in evidence as "U. S. Exhibit 1.")

Q. Mr. Abreu, I show you this application which you said you filled out, U. S. Exhibit 1, and call your attention to the date September 20, 1946. Now, at the time that you filled out that application, you had already been discharged from the Army, had you not? A. Yes.

Q. So you must have been discharged some time before that date? A. Yes, it must have been.

Q. How long had you been working for Lantis Motors at the time that Mr. Lantis took you down to the surplus property office?

A. That I can't say. A couple of months, I guess.

Q. Now, in connection with the purchase of a vehicle from surplus property office, what next happened?

A. He had some kind of a form. He told me to sign my name on it at the shop. That was the next thing.

Q. Now, who had a form? A. Mr. Lantis.

Q. He asked you to sign your name to it? [9]

A. Yes, sir.

Q. And where did you sign your name to it?

A. On the bottom of the form.

Q. I didn't hear you, Mr. Abreu.

A. On the bottom of the particular form.

(Testimony of Oliver Abreu.)

Q. But that was at Lantis Motors that you signed it? A. Yes, sir.

Q. Was there anything filled in the form?

A. No, sir.

Q. Mr. Abreu, I show you a form entitled "Veteran's Purchase Order," and ask you if this is your signature on the bottom? (Showing a document to the witness.) A. Yes, sir.

(Mr. Hoddick hands document to Mr. Ridley.)

Q. Now, is this the type of form which Mr. Lantis had you sign your name on the bottom of?

A. Yes, sir.

Q. Did you ever sign any other forms of this kind? A. No, sir.

Q. You only did that once and that was at Mr. Lantis' request? A. Yes.

Q. And this is your signature on the bottom of the form? A. That's right. [10]

Q. And about how long did this occur after the time that you went down to the surplus property office with Mr. Lantis?

A. A few weeks after, I guess.

Mr. Hoddick: I would like to offer this in evidence, your Honor. (Handing document to the Court.)

Mr. Ridley: No objection.

The Court: Received in evidence as exhibit——

The Clerk: U. S. Exhibit No. 2.

(Testimony of Oliver Abreu.)

(The document referred to was received in evidence as "U. S. Exhibit No. 2.")

Q. Now, Mr. Abreu, again in connection with the purchase of a vehicle from the surplus property office, what occurred next in this series of events? What happened next?

A. Well, he told me to go down the surplus office down there on Ala Moana.

Q. How long was that after you filled in, put your name on the bottom of the form—a few days?

A. That I can't say. Some time after. We went down and he told me he is going to get a jeep instead.

Q. You went down together in his car?

A. Yes, sir; and filled out some other forms, and he gave me the money and I gave the fellow the money down in the office.

Q. How much money did he give you? [11]

A. Three hundred twenty-five.

Q. Was there any talk at that time that this was a loan?

A. No, sir. I was getting the jeep for him.

Q. You mean for Mr. Lantis?

A. That's right.

Q. How is it that you were getting a jeep instead of a station wagon or sedan as he had originally requested?

A. Well, I didn't care what he got. That was for him. He said that the sedan was too much money and a station wagon was in bad shape.

(Testimony of Oliver Abreu.)

Q. That's what Mr. Lantis told you?

A. That's right.

Q. So he said he wanted a jeep instead, is that it?

A. That's right.

(Mr. Hoddick shows a document to Mr. Ridley.)

Q. Mr. Abreu, what kind of business was Mr. Lantis in?

A. Auto repairing and U-Drive.

Q. He also had a U-Drive business?

A. Yes, sir.

Q. Did he have a considerable number of vehicles in the U-Drive part of his business?

A. Yes, sir.

Q. And what kind of vehicles did he use in the U-Drive business? [12]

A. All kinds — sedans, jeeps and some Army trucks. I don't know what they call them. Recons, I guess.

Q. The second time you went down to the surplus property office, you say that you filled out some more forms?

A. That's right.

Q. Did you fill those forms out before you paid them the money or afterwards?

A. Before I paid them.

Q. And how much money did you pay them?

A. Three hundred twenty-five.

Q. And that money Mr. Lantis handed to you?

A. That's right.

Q. I show you a document marked "Notice of

(Testimony of Oliver Abreu.)

Sale, Interior Department, Surplus Property Office," dated, a stamp date on it is November 18, 1946, and ask you if this is the form which you signed the second time you went down to the surplus property office with Mr. Lantis? (Handing a document to the witness.) A. That is the one.

Q. You signed it in two places, is that right?

A. Yes.

Q. Now, were there a lot of copies that you had to sign, too? A. That's all.

Q. Mr. Abreu, were there other copies of this form [13] that you signed at that time, do you remember?

A. Well, at that time, the last time I went down I signed a few of them.

Q. You only went down twice?

A. Only went twice.

Q. And you signed this form the second time you went down? A. That's right.

Q. And you signed more than one?

A. Yes.

Mr. Hoddick: I'd like to offer this in evidence, your Honor, as the Government's third exhibit.

(Handing document to the Court.)

Mr. Ridley: No objection.

The Court: Received as exhibit——

The Clerk: U. S. Exhibit No. 3.

(The document referred to was received in evidence as "U. S. Exhibit No. 3.")

Q. Now, Mr. Abreu, when you signed the form

(Testimony of Oliver Abreu.)

that I just showed you, Exhibit No. 3, where was Mr. Lantis? A. Right alongside of me.

Q. Was he right beside you at the time you paid the money for the jeep? A. That's right.

Q. What did you do next in connection with getting [14] the jeep? A. Nothing.

Q. Well, didn't you have to go some place and pick it up?

A. Yes, I went afterwards. We went to pick it up. He sent other employees down and we towed it back—a couple of them.

Q. Did Mr. Lantis go with you?

A. That's right.

Q. And where did you go?

A. Iroquois Point.

Q. And how many jeeps did you bring back from Iroquois Point? A. I think three.

Q. Did you then do anything about having the jeep registered in your name?

A. Yes, I went down to the City Hall and I had it signed.

Q. Was that the same day that you brought the jeeps back from Iroquois Point?

A. No. I think a couple of days after. Went down there and have it registered and I had it signed in the back of it, and that was all.

Q. Did you ever do any repair work on these jeeps later? A. I worked on all of them. [15]

Q. And what were the jeeps used for?

(Testimony of Oliver Abreu.)

A. He sold some of them and some of them were used for U-Drive.

Q. Did you ever use them?

A. I never did.

Q. For your own personal use, that is, aside from the business? A. No, sir.

Q. When you purchased the jeep, did you ever intend to make any use of it? A. No, sir.

Q. Were you at all troubled, Mr. Abreu, that the purchase of this jeep might be in violation of the law? A. I didn't know then.

Q. Did you worry about it at all?

A. Well, some time after we got the jeep I asked Mr. Lantis if it won't get me in trouble, me turning over the jeep like that. I was supposed to keep it about a year, somebody told me, and he said no; he said, don't worry about it.

Q. Is that all he said when you asked him about getting into trouble?

A. That's all he said. Some time after that a police officer came over and handed me a subpoena, told me if I owned the jeep. I told him no. And the next day when I went [16] to work I told Mr. Lantis, how come the jeep was under my name yet? So he said he forgot about it, and he was too busy. Then sometime, a couple of days after that again another officer came over with another subpoena, and the jeep was still under my name, which I didn't know. Then after that I guess he changed it to his name.

(Testimony of Oliver Abreu.)

Q. You never went down to the police station in response to those subpoenas? A. No, sir.

Q. Mr. Abreu, you were with Lantis Motors for a couple of years, weren't you?

A. Yes, sir.

Q. Were there any other vehicles around Lantis Motors that had been purchased from surplus property office? A. Yes, sir.

Q. Quite a few of them? A. Yes, sir.

Q. Did Mr. Lantis say anything about these other vehicles at the time you asked him about getting into trouble in connection with this jeep?

Mr. Ridley: If your Honor please, I don't exactly understand the import of counsel's questioning, but it certainly appears to me that he is attempting to show that we purchased other vehicles in violation of the law, and hearsay or supposedly admissions on the part of the defendant after [17] this story that he has told I submit that that is absolutely improper. It is outside the scope of this indictment.

Mr. Hoddick: Excuse me, counsel. That is not the purport of the question or the place where we are going.

Mr. Ridley: In other words, you are talking about legal transactions around there. We admit that we purchased many jeeps legally, but not at that time.

Mr. Hoddick: I will withdraw the question.

(Testimony of Oliver Abreu.)

Mr. Ridley: There is such a thing as a dealer's license, too.

Mr. Hoddick: If I can have a half minute of the Court's time—I'd like to have these marked for identification purposes. They are application for registration of passenger-carrying motor vehicle, dated December 2, 1946; motor vehicle certificate of ownership, dated December 2, 1946; and certificate of ownership, dated July 15, 1947.

The Clerk: You want these marked for identification?

Mr. Hoddick: Please.

The Clerk: Application for registration would be "U. S. B-1 for Identification"; the certificate of ownership, dated December 2, '46, will be "U. S. B-2 for Identification"; and the certificate of ownership, dated July 15, 1947, will be "U. S. B-3 for Identification".

(The documents referred to were marked "U. S. Exhibit B-1, B-2, B-3 for Identification".)

Mr. Hoddick: I'd also like to have marked for identification purposes another copy of the notice of sale, dated December 2, 1946, stamp dated.

The Clerk: Notice of sale will be "U. S. C. for Identification."

(The document referred to was marked "U. S. Exhibit C for Identification".)

Mr. Hoddick: As to "U. S. Exhibit B-1, B-2, B-3 for Identification", and "U. S. Exhibit C for Identi-

(Testimony of Oliver Abreu.)

tification", these documents constitute part of the official files of the Department of Motor Vehicles, and I would like at this time to ask leave of Court to withdraw them, if they are admitted in evidence.

Mr. Ridley: Are these the same documents that I subpoenaed? If those are the same ones—you got them from the City and County Treasurer's Office?

Mr. Hoddick: Yes.

Mr. Ridley: If they are the same ones, I will stipulate that they go into evidence. It is part of our defense. I will stipulate that they may go into evidence, your Honor.

Mr. Hoddick: Well, then, let's have these marked as U. S. Exhibits. U. S. Exhibits for identification purposes, B-1 through B-3 to go into evidence, and U. S. Exhibit for identification purposes C—they are offered in evidence.

The Court: B-1 through 3, and B-C? [19]

The Clerk: No, the other one is C for identification. B-1 to 3 is for identification, and C is for identification?

The Court: Yes. All right.

The Clerk: B-1, 2 and 3 for identification would be U. S. Exhibit 4-A, B and C in evidence; and Exhibit C for identification will be U. S. Exhibit No. 5.

(The documents referred to were received in evidence as "U. S. Exhibit 4-A, B and C" and "U. S. Exhibit 5".)

(Testimony of Oliver Abreu.)

The Court: All right.

Q. (By Mr. Hoddick): Mr. Abreu, I show you U. S. Exhibit No. 4-A, B and C, and U. S. Exhibit No. 5, and ask you if your signature appears on each of those? (Showing exhibits to the witness.)

A. That's right.

Q. Now, at the time that you went down to the——

The Court: What is the answer?

The Witness: Yes, sir.

Q. At the time that you went down to the Department of Motor Vehicles, with Mr. Lantis——

Mr. Ridley: Just a moment, if your Honor please. That is about the fifth time counsel has used the words "went some place with Mr. Lantis". And the witness on previous testimony has testified that he went three times and reduced it to two, and counsel assumes something not in evidence by stating that Mr. Lantis went down to the Department of Motor [20] Vehicles with him apparently for the purpose of making, doing all that registration.

Mr. Hoddick: Mr. Ridley, if you followed the testimony of the witness you would know that he has already testified that he went to the Department of Motor Vehicles with Mr. Lantis after he brought the jeep back from Iroquois Point. And that confines it. I want to make it precise. So this isn't some time when he went down on his own.

Mr. Ridley: I will withdraw the objection, but let him testify, please.

Mr. Hoddick: All right.

(Testimony of Oliver Abreu.)

Q. At that time did you sign your name on the rear of U. S. Exhibit No. 4-C in which you released your equity in the vehicle as the legal owner?

A. That's right.

Q. And when did you sign your name, the signature of the registered owner, releasing interest in the vehicle on U. S. Exhibit No. 4-B? When did that happen?

A. The same day when I went down to the City Hall.

Q. Was that when you had the jeep registered?

A. That's right, same date. I didn't go back again.

Q. So you signed both of these the same day?

A. Yes, sir.

The Court: Well, now, let's have it straight. You went down there alone or with someone? [21]

The Witness: Mr. Lantis took me down.

The Court: Proceed.

Mr. Hoddick: I have no further questions to ask of this witness.

Cross-Examination

By Mr. Ridley:

Q. Mr. Abreu, again calling your attention to U. S. Exhibit 4-A, 4-B and 4-C and No. 5—let's take No. 5. Do I understand that you took that No. 5, that is, the big one here, down to the City and County Treasurer's Office for the purpose of getting an ownership certificate?

(Testimony of Oliver Abreu.)

A. I didn't take no papers down.

Q. Where did this paper come from?

A. Mr. Lantis had it, I guess.

Q. Mr. Lantis had it? How did you happen to go down if he had the car already?

A. I went with him. That's all. He asked me to go down with him.

Q. In other words, you just went down? And then, do I understand, that after that—what did you do after you got down there, turned this thing into the City and County Treasurer's Office?

A. I don't know. I signed the ownership papers.

Q. You signed the ownership papers? Here is one on December 2nd. That is when you went down, didn't you? [22]

A. I don't remember the date.

Q. Well, it was shortly after, within a week or two after you had gotten the car from Iroquois Point, wasn't it?

A. Some time after we got it.

Q. It was the same year, wasn't it?

A. It's the same year.

Q. And it's noted on there December 2nd. Was that approximately the date that you went down to the City and County Treasurer's Office?

A. I can't say.

Q. And at that time the car was placed in your name, wasn't it? A. That's right.

Q. Then you signed on the back of it, that is, as far as legal owner was concerned at that time,

(Testimony of Oliver Abreu.)

didn't you? Look on there. (Showing exhibit to the witness.) You signed off as legal owner only at that time, didn't you? A. I guess I did.

Q. And you still remained on there as registered owner, didn't you? A. I didn't know that.

Q. Wasn't this certificate here issued to you at that time with your name as registered owner and Mr. Lantis' name as legal owner on that same date, December 2nd?

A. Only what I remember, I went down to the City Hall [23] once with him. That's all.

Q. I understand. But wasn't that issued to you at that time? A. I didn't take it, though.

Q. I understand that. But wasn't that issued at that time? Oliver Abreu as registered owner and Robert Landis as legal owner, after you had signed this original certificate, signed over as legal owner off the original certificate, isn't that correct?

A. It must be. It says over there.

Q. So that you were registered owner at that time, isn't that so? A. Yes.

Q. Now, as a matter of fact, calling your attention to the date July 15 on this second certificate, U. S. Exhibit 4-B, I call your attention to the signature on the back there, one signature Robert Abreu as registered owner and one signature Robert Lantis as legal owner. You signed that off, did you not?

A. Yes.

Q. You didn't sign that off, did you, until July

(Testimony of Oliver Abreu.)

15th, some six or eight months later, isn't that correct? A. That I don't remember.

Q. Didn't you sign it off about six or eight months later so that Mr. Lantis could then finally get the car in [24] his own name after six or eight months?

A. It must be. That's my signature.

Q. I see. Now, you signed this application on December 2nd, too, where you applied to be registered owner, didn't you?

A. That's my signature.

Q. I see. Wasn't the reason that you had the car placed in your name as registered owner and Mr. Lantis as legal owner on December 2nd was to secure him for your repayment to him for that \$325? A. He didn't say anything like that.

Q. That wasn't the reason it was placed in your name as registered owner and in his as legal owner?

A. I don't remember that.

Q. Well, do you deny it is a fact?

A. I can't deny it. It says over there.

Q. I see. Now, as a matter of fact, Mr. Lantis never even saw this car before you had purchased it from the surplus property office, had he, this jeep?

A. That I don't know. I can't say he seen it. I didn't go down there and pick it out.

Q. Do I understand, then, what happened in this particular case is that you originally went down and filled out a so-called application for surplus property? A. I filled that out. [25]

(Testimony of Oliver Abreu.)

Q. On September 20, 1946? Was Lantis with you at that time? A. That's right.

Q. And then this whole thing was filled out at that time, was it not? A. That's right.

Q. And there is one jeep, \$325, note on there, is there not?

A. That wasn't on there at that time. I didn't put that there.

Q. You mean that was not on the application at that time?

A. I didn't put that there. I put this 2 here. I didn't put the jeep down.

Q. Wasn't that scratched off at that time and the jeep filled in there at that time?

A. I don't know.

Q. Was Lantis with you at this time that you went down with this application?

A. That's right.

Q. It's all in your handwriting, isn't it?

A. That's right.

Q. All right. I call your attention to this so-called purchase order application, dated—or veteran's purchase order—dated 9/20, being U. S. Exhibit 2. Is that the [26] purchase order covering the same jeep?

A. I don't know because when I filled that out these names wasn't on there.

Q. I see. Do I understand that after you got this original application or filed it, Exhibit No. 1, that you finally received a notification from the sur-

(Testimony of Oliver Abreu.)

plus property office to the effect that they had a car for you or a jeep for you, is that correct?

A. Waiting to pick it up, you mean?

Q. Had one ready for you?

A. That's right.

Q. Well, what was—is that when you went down to sign this purchase order? A. No, sir.

Q. Well, did you sign that purchase order before or after you were notified by the purplus property office? A. Before.

Q. Before? In other words, you went down. Did you sign this purchase order at the same time that you signed this application? A. No, sir.

Q. Well, they are both dated—no, one is dated 11/12. I see. Then this here, U. S. Exhibit 2, this purchase order was signed by you before you received notification that there was a jeep ready for you, is that right? [27] A. That's right.

Q. I call your attention again to that and ask you if you wish to clarify your testimony? That is dated November 11, 1948, some very few days before you finally got delivery of the jeep.

Mr. Hoddick: 1946.

Mr. Ridley: 1946

Q. Just a few days before you got delivery of the jeep, according to your own testimony. Now, does that refresh your recollection? Was that before or afterwards?

A. I think I signed this before they called me down.

(Testimony of Oliver Abreu.)

Q. Do you know whether you signed it before or after? A. I am pretty sure.

Q. Was that \$325 on there in red?

A. They had no writing on here.

Q. No writing on there?

A. I just signed my signature on that.

Q. Well, you went down finally, did you not, and signed this so-called notice of sale?

A. Yes, that's my signature.

Q. All right. That is a notice of sale. That covers the specific jeep in question, does it not?

A. Yes.

Q. All right. That is dated November 13, 1946, and this one here, this purchase order, is dated November 12. [28] Does that refresh your recollection as to when you went down?

A. I don't know what you are getting at.

Q. Well, it is the day after that that you got the jeep, isn't it?

A. Well, I didn't care what he got. When we went down he told me he was going to get a jeep. But I didn't care.

Q. Listen, isn't it true that you wanted a jeep?

A. No, sir.

Q. To work and use to run around in while you were working for Lantis Motors, Limited?

A. No, sir.

Q. Are you sure that is not a fact?

A. Yes, I am sure.

Q. So that you would go to and from work and

(Testimony of Oliver Abreu.)

also to go out and pick up parts and things of that nature, isn't that true? A. No, sir.

Q. Isn't it true, as a matter of fact, that Lantis never even heard about the particular jeep in question until after you brought it back to the shop?

A. That I don't know, because I didn't fill out those numbers here, what it says here.

Q. Well, when did Lantis first find out about it, about this particular jeep? [29]

A. That I don't know. Every time he tells me to go down, I'd go down with him. That's all.

Q. How many times did you go down to the office with him? A. Twice.

Q. You went down on three occasions, did you not? A. No, I didn't.

Q. Only twice? A. Only twice.

Q. And you signed up these three separate documents on two occasions? A. Three occasions.

Q. Well, which is it, two or three?

A. Three. I signed this one down——

Mr. Hoddick: Mr. Ridley, excuse me. To keep the conclusions from his testimony straight, he said he signed the second document, the purchase order, at Lantis Motors.

Mr. Ridley: That is his testimony, Mr. Prosecutor. If your Honor please, this is cross-examination.

Mr. Hoddick: That's right, but I don't like to have you confusing the witness and leading him all around Robinson's barn.

(Testimony of Oliver Abreu.)

Mr. Ridley: All right.

Q. (By Mr. Ridley): Where did you sign this purchase order? [30] A. Beretania Motors.

Q. Beretania Motors? And you signed that on November 12th?

A. It must be. I don't remember.

Q. And that is the day before you went down and got this notice of sale? A. Yes.

Q. Well, wasn't this \$325 jeep noted on this thing at the time? A. No, sir.

Q. That wasn't on there? A. No.

Q. In other words, you went down and had a complete notice of sale all made out for the following day and ready to pick up the jeep without even having any reference to the jeep the day before, is that correct? A. I guess so. I don't know.

Q. Well, do you have any recollection as to what actually occurred? Do you remember what did occur?

A. What he told me was, sign this, and after that I went down here. He gave me the \$325 and I gave the fellow \$325.

Q. Didn't he give you the \$325 so that you could buy yourself a jeep? Didn't he loan it to you?

A. He didn't loan it to me. I was buying it for him. [31]

Q. Isn't it true, as a matter of fact, that he loaned you the \$325? A. He did not lend me.

A. All right. I will call your attention to one further question. When the jeep came back—you

(Testimony of Oliver Abreu.)

brought the jeep into Lantis Motors, Limited, yourself? A. Three of us.

Q. In Lantis Motors, Limited, down on 800 Beretania Street? A. Yes, sir.

Q. That was a Hawaiian corporation, wasn't it?

A. I don't know.

Q. Of which Mr. Lantis was president at the time?

A. I don't know. I was working for Mr. Lantis. That's all I know.

Q. Well, it was down at 800 Beretania Street?

A. That's right.

Q. And that's where you brought the car or the jeep? A. I took it in the shop, yes.

Q. And you had to tow it down there through-out? A. Yes, sir.

Q. And didn't you have a conversation with Mr. Lantis at that time when you brought the jeep in as to how come you purchased a wreck like that?

A. No, sir. [32]

Q. You never had any conversation to that effect? A. No, sir.

Q. Didn't Mr. Lantis at that time tell you you were foolish or crazy to buy such a wreck?

A. I didn't buy it. He bought it.

Q. Well, didn't Mr. Lantis tell you to that effect? A. No, he didn't tell me nothing.

Q. And didn't he tell you at that time that it wasn't worth the price that you paid for it?

A. He didn't tell me nothing.

(Testimony of Oliver Abreu.)

Q. He didn't tell you anything about that?

A. No.

Q. Try to refresh your recollection a little further. Didn't you tell Mr. Lantis at the time that the reason you wanted it, even though it wasn't worth it, was because you thought you could repair it on your own time in Lantis Motors?

A. I didn't buy it for myself. I wasn't going to use it for myself. I didn't care what he bought.

Q. Do you mean to tell me that Mr. Lantis and yourself purchased this jeep sight unseen, is that the way it happened?

A. Well, he was a pretty good friend of mine and I did that as a favor.

Q. Purchased him a jeep wreck, isn't that correct?

A. That's right.

Q. This thing wouldn't even run for three months, [33] would it?

A. It wasn't running.

Q. It wouldn't even run? How did you get it down to the Treasurer's Office for weight purposes in order to get weighed in so that you could get a certificate of title?

A. That I don't know. I didn't take it down.

Q. As a matter of fact, that jeep was laid up and you worked on it for three months?

A. I don't know how long.

Q. Well, you worked on it for approximately three months, didn't you?

A. Let's say three months. I don't know.

Q. Well, was it more than three months?

(Testimony of Oliver Abreu.)

A. It wouldn't take that long to fix any kind of a car.

Q. What was wrong with it?

A. It was frozen, I think.

Q. And it was a 1941 Willys, wasn't it?

A. That's what it says there.

Q. That's right. And that was one of the worst jeeps ever put out as far as value is concerned?

A. I don't know. It's pretty old.

Q. It was an old one? A. Yes.

Q. And did you have any discussion about repairing [34] it with Mr. Lantis?

A. No, I'd repair anything he'd tell me.

Q. Well, how long did it take you before you had it repaired? A. I can't tell.

Q. But it did take you several months, isn't that correct?

A. That I can't tell you either. There are a few of them there.

Q. Did you ever get the car finally repaired as a mechanic?

A. All of them got repaired finally.

Q. Did you ever drive the car after you repaired it?

Mr. Hoddick: Pardon me, Counsel. I'd like you to frame your questions so we will know which car you are talking about. The witness testified to bringing back three jeeps.

Mr. Ridley: I am talking about the particular

(Testimony of Oliver Abreu.)

jeep in question, which is the only one before your Honor that is being considered.

Mr. Hoddick: There is no showing that the one he worked on in the shop is the one that he brought back from the——

Mr. Ridley: I will clear that up.

Q. You are referring to this jeep that is covered by these various exhibits, which you say you worked on and repaired? [35]

A. I worked on all of them. I can't point out the particular one.

Q. You worked on that particular jeep, did you not?

A. I must have because I worked on all of them.

Q. Is that the only basis of your testimony, that you worked on it, is that you must have because you worked on all of them?

A. Because I can't pick out the particular one.

Q. Did you ever, do you remember working on that particular jeep?

A. Yes, I worked on that jeep.

Q. You remember now to the effect that it was frozen, don't you?

A. Yes, sir.

Q. The engine was frozen?

A. Three of them were frozen.

Q. And the engine on that particular one was frozen?

A. Yes, sir.

Q. You remember that it was a 1941 Willys, don't you?

A. Now I do because the paper says it.

(Testimony of Oliver Abreu.)

Q Now you remember? Otherwise you don't have any recollection of the transaction, is that right? A. That's right.

Q. Well, do you have any recollection as to how you came to purchase this vehicle or this jeep, this particular [36] jeep?

A. I didn't do no purchasing like that. He went down and picked it out himself.

Q. You mean he went down and picked out an old jeep himself ahead of time?

A. That's right.

Q. Where did he go to pick out this jeep?

A. That I don't know. I didn't go with him.

Q. Well, how do you know he went down to pick it out? A. He must have. Who else?

Q. In other words, you are just assuming that he went down, is that correct?

A. It must have been him.

Q. You mean to say that you think now that Mr. Lantis went down and picked that out, that old wreck jeep, for \$329? A. Yes, sir.

Q. At the time that jeep came in into Lantis, it wasn't worth half of that?

A. They were selling all at that particular price.

Mr. Hoddick: I move that the answer be stricken, whatever it was.

Mr. Ridley: No objection, if your Honor please.

The Court: I got the question. All right. You are both in agreement. It may be stricken.

Q. Now, then, you finally left Lantis Motors,

(Testimony of Oliver Abreu.)

Limited, [37] around April or May somewhere or half of June in 1947? That's about five or six months after this so-called jeep purchase?

A. No, sir. I kept on working there but not for him.

Q. How long did you work for Lantis Motors?

A. About a year.

Q. About a year? A. That's right.

Q. Were you there on September 9th? Were you there in September when the firm closed down?

A. One year.

Q. Do you remember, as a matter of fact, that Mr. Jack Russell and one Mr. Cyles on September 19th, to refresh your recollection,—

A. Yes, I worked for him.

Q. —finally severed their connections on September 19, 1947, from Lantis Motors, Limited?

A. Yes.

Q. Then they reopened the place under their own names, Beretania Motors? A. That's right.

Q. Were you working at that time for Mr. Russell and Mr. Cyles? A. That's right.

Q. Now, as a matter of fact, Mr. Lantis was there during the early part of the year 1947, was he not?

A. That's right.

Q. And around about the end of April, 1947, or the early part of May, he turned over the business to Mr. Cyles and Mr. Russell to run, didn't he?

A. I guess so.

Q. Well, you know that following that, two or

(Testimony of Oliver Abreu.)

three months following that, that Mr. Russell and Mr. Lantis and Mr. Cyles had a falling out and that they started suing one another, you know about that, don't you? A. Yes, sir.

Q. And wasn't it about July, after they were having this altercation, the three of them as stockholders, that you finally went down to Mr. Lantis and gave him not only the white slip to the car but signed off under date of July 15th so he could take that car back into his own name, or take it into his own name?

A. Like I said, the only time I knew that the car was under my name yet—the police officer handed me a subpoena over in my place. Then the next day I approached him and I told him, I thought you said that the car was yours; it's still under my name. He said he will have that fixed; he was too busy; he didn't have time. So a couple of days after that I had another subpoena, and I went back to him. I was pretty mad about it. I didn't use the jeep. Why should I have the ticket under my name? [39]

Q. Isn't it a fact that Mr. Lantis takes care of all subpoenas for his employees down at the police department, no matter whose car they were driving during the time that you worked for them?

Mr. Hoddick: Objection. That calls for a conclusion on the part of the witness. Objection. He can't know, as a matter of fact, what Mr. Lantis did as to other employees.

(Testimony of Oliver Abreu.)

Mr. Ridley: I think he is familiar with that. I will withdraw the question.

Q. Aren't you familiar with the fact that Mr. Lantis did take care of all subpoenas for traffic violations for his employees down there?

Mr. Hoddick: Objection.

A. I don't know.

Mr. Hoddick: Objection again. He can testify as to particular subpoenas he has knowledge of.

Mr. Ridley: I will submit to your Honor's ruling.

The Court: The witness answered. He said he didn't know.

Q. (By Mr. Ridley): Now, then, isn't it true that it wasn't until July, now that you refreshed your recollection, the 15th, 1947, that you finally transferred the ownership absolutely to Mr. Lantis?

A. I don't remember no dates. [40]

Q. Well, you don't remember any date in spite of that certificate of ownership?

A. I don't remember when I signed that. I know I signed it over to him.

Q. All right. I will ask you one further question in that connection. Isn't it true that after you went down on December 2nd and got your original certificate, the two original certificates before, that it when you first got it in your name, and after you signed off and got it registered in both of your names, that is, signed off on the original, both of our names as owner on December 2nd, isn't it true that you later received a white registration slip from

(Testimony of Oliver Abreu.)

the City and County of Honolulu, Treasurer's Office? A. I didn't.

Q. Wasn't that mailed to you some time later?

A. I don't remember.

Q. Isn't it true that you didn't, that you weren't able to dig up that slip until July 15th, 1947, when you finally signed off the whole ownership of that jeep to Mr. Lantis?

A. I didn't get you then.

Q. Well, when you finally signed off to Mr. Lantis the legal ownership, that was some six or eight months after the original transaction, wasn't it? You don't deny that, do you? [41]

A. I can't say.

Q. O.K. Isn't it true at that time that you finally produced the white registration certificate you had in your possession for a number of months previous?

A. I didn't have the white slip.

Q. You didn't? You deny that?

A. That's right. I didn't have it.

Q. All right. I will ask you if it isn't true that at the time that you signed over the legal ownership to Mr. Lantis he finally got a hold of you and made demand on you, or just prior to that, he got a hold of you and made demand not only for the \$325 that you owed him but also the amount of the bill that you had with Lantis Motors, Limited, isn't that true?

A. No, sir. I didn't pay him for no repair bill.

(Testimony of Oliver Abreu.)

Q. I understand that. But isn't it a fact that he got a hold of you before you signed off and made demand upon you not only for \$325 but also a certain bill that you owed Lantis Motors, Limited?

A. No, sir. I didn't owe him no money.

Q. And isn't it true, as a matter of fact, that you finally agreed, because you couldn't raise the money yourself, that you finally offered to transfer the jeep to Mr. Lantis's satisfaction of these two indebtednesses?

A. We didn't talk nothing of the sort. [42]

Q. And yet you had no recollection when any of these transactions occurred?

A. That's right.

Q. This is the only transaction that was involved, this one jeep that you ever were involved in, isn't it?

A. Yes.

Q. Now, one or two more questions. Mr. Russell took over the management of Lantis Motors, Limited, at 800 Beretania Street, right after, about May of 1947, did he not?

A. I don't remember the date. Right after. He didn't have control, I know.

Q. Right after? That is the time that they were trying to settle up the affairs of the concern?

A. Yes.

Q. You remember that? That was during the summer or almost in the summertime?

A. I don't remember the dates.

The Court: Which Jack Russell is this?

Mr. Ridley: Which, if your Honor please?

(Testimony of Oliver Abreu.)

The Court: Which Jack Russell is it you are talking about?

Mr. Ridley: One Jack Russell. That's about all I can describe him by, if your Honor please. It is not the lawyer, if that is what your Honor is referring to. He is just an individual by that name.

Q. He was at the time a stockholder in Lantis Motors, Limited, or do you know that?

A. I don't know.

Q. Well, he was the man managing after Mr. Lantis left? A. That's right.

Q. Now, isn't it true that after Mr. Russell and Mr. Cyles in September both quit the concern and opened up their own place—you remember that much—— A. Both of them quit.

Q. ——didn't they both quit and open up their own place under the name of Beretania Motors?

A. That's after Lantis left.

Q. I mean after Lantis left. A. Yes.

Q. You remember that? And you continued to work for them, did you not? A. Yes.

Q. All right. The following year, in 1948, there was a fire that occurred out there, wasn't there?

A. That's right.

Q. And isn't it true that——

Mr. Hoddick: Objection. Can I have some offer of proof on this? I think we are going pretty far afield, a fire in 1948, and changed management in the latter part of '47. What does this have to do with the instant case? [44]

(Testimony of Oliver Abreu.)

Mr. Ridley: Well, you can move to strike it.

Mr. Hoddick: Well, I object to the question. I suggest that you make an offer of proof if you consider it material and relevant.

Mr. Ridley: I don't see any necessity, if your Honor please, of going into that extent.

The Court: But that is true about making an offer of proof. I can't see where this is cross-examination.

Mr. Ridley: Well, that, of course, if your Honor please, wasn't the ground of the objection.

The Court: What?

Mr. Ridley: That wasn't the ground of the objection, if your Honor please.

The Court: Well, I know, but then I don't care to listen to something that as far as I can see has no relevancy.

Mr. Ridley: Well, I will withdraw the question. I have one or two more questions.

Q. When was the first time that you finally were contacted about this matter by the F.B.I.?

A. This was right after the police officer handed me the subpoena; Mr. Newberg came to the shop and talked to me about it.

Q. Of the F.B.I.? A. That's right.

Q. And when was that? What year? [45]

A. I don't remember what year. Some time after that.

Q. Was it before you transferred the car to Mr. Lantis in 1947? A. It was after that.

(Testimony of Oliver Abreu.)

Q. Oh, after that? A. Yes.

Q. Well, do you have any recollection when it was?

Mr. Hoddick: I will object to a continuation of the questions as to the investigation that was made in the matter. I don't think that is material or relevant.

Mr. Ridley: If your Honor please, it goes to the credibility of the witness, as to how come this story was never told until some two years later.

The Court: Go ahead.

Q. It was only here last year, isn't that true, about six months or eight months ago or maybe nine months ago that you were finally contacted about this case? A. That's right.

Q. And isn't it true that Mr. Jack Russell over in 800 Beretania, Beretania Motors, whom you formerly worked for, told you to go down and tell the F.B.I. about this? A. No, sir.

Q. That is not true?

A. That is not true.

Q. Didn't he threaten, if you didn't go down there [46] and tell about this, that he'd see that criminal prosecution was taken against you in connection with that fire that occurred there in 1948?

A. He did not.

Q. Are you sure about that?

A. I am positive.

Q. How did you happen to go down to the F.B.I.? A. I did not go down.

(Testimony of Oliver Abreu.)

Q. And you mean to say they did not contact you until almost two years after this thing occurred? A. That's right.

Q. Did you discuss the matter with Jack Russell?

A. No, sir. I had nothing to do with the jeep.

Q. You know, as a matter of fact, that Jack Russell reported this and asked you to go down to report as a witness?

A. He did not talk to me about it.

Mr. Ridley: That's all, if your Honor please.

The Court: We will take a recess.

(A recess was taken at 10:30 a.m.)

After Recess

Redirect Examination

By Mr. Hoddick:

Q. Mr. Abreu, at the time that the jeep was purchased from surplus property office, did you have a car? A. Yes, sir. [47]

Q. What kind of a car was it?

A. '32 Ford Roadster.

Q. Was it in running condition?

A. Yes, sir.

Q. You used it every day? A. Yes, sir.

Q. Did you ever see this jeep or any of the jeeps that you picked up at Iroquois Point before the day you went down there for them?

A. No, sir.

(Testimony of Oliver Abreu.)

Q. You testified on cross-examination that a Mr. Lantis left the business in May of 1947.

A. 1947, I don't know the month.

Q. Well, could you give us an approximate date on it?

The Court: Well, what is the materiality of that?

Mr. Hoddick: Your Honor, I am endeavoring to fix the time when the witness placed his signature on the transfer of the equitable interest in the jeep.

The Court: Well, aren't the papers dated?

Mr. Hoddick: But there is no reason to suppose that the signature was placed on the certificate at the time of the date stamped.

The Court: All right.

Q. Now, I ask you if you knew approximately when Mr. Lantis left the business there in Bere-tania Street? [48]

A. That I can't say.

Q. I didn't hear your answer.

A. I can't say that. I don't remember.

Q. Did you sign both of these exhibits, U. S. B-2 and U. S. B-3, at the same time?

A. I don't remember.

Q. You remember signing them both, though? At least, that is your signature?

A. I don't remember signing them both. As I said, I only went down to the City Hall once.

Q. Well, did you at any time other than the time that you went to the City Hall sign any papers

(Testimony of Oliver Abreu.)

concerned with the registration of the jeep, either at Lantis Motors, at your home, or anywhere else?

A. I don't remember.

Mr. Hoddick: No further questions.

Recross-Examination

By Mr. Ridley:

Q. You knew you had to sign off some time after the first transaction because the jeep was registered in your name? A. That's right.

Q. So it was six or eight months after you finally signed off, isn't that correct?

A. That's what the paper said. [49]

Q. I understand that. But according to your recollection, isn't that true?

A. It must be true.

Q. You had a couple of subpoenas, according to you, on account of the fact that the car was in your name, isn't that true? A. That's right.

Q. And that was several months after this original transaction, wasn't it?

A. That's right.

Q. So therefore it must have been after you got those subpoenas that you finally signed over completely, isn't that correct?

A. That I don't remember, signing the thing off to him.

Q. Oh, you don't have any recollection of ever signing it off? A. No.

Mr. Ridley: That's all.

The Court: All right. Call the next witness.

(Witness excused.)

Mr. Hoddick: Those are all the witnesses for the Government, your Honor.

The Court: All right. The Government rests?

Mr. Hoddick: The Government rests. [50]

The Court: All right. Proceed.

ROBERT NELSON LANTIS

a witness in his own behalf, being duly sworn, testified as follows:

Direct Examination

By Mr. Ridley:

Q. State your full name.

A. Robert Nelson Lantis.

Q. And you are the defendant in this case?

A. Yes.

Q. You reside here in Honolulu, City and County of Honolulu, Territory of Hawaii?

A. Yes.

Q. Back in 1946 or the latter part thereof, were you connected with the Lantis Motors, Limited?

A. Yes.

Q. Was that a Hawaiian corporation?

A. Yes.

Q. And do you have any recollection as to when that corporation started to do business or when it was organized?

A. Around the first of August, 1946.

(Testimony of Robert Nelson Lantis.)

Q. I am talking about when it was incorporated.

A. July.

Q. July? A. '46. [51]

Q. Is that when you first decided to go into business or when the articles of incorporation were filed, Mr. Lantis?

A. We opened up in July. The corporation was filed—I couldn't say that. It was later.

Q. About a month later, isn't that true?

A. About a month maybe before we got the seal.

Q. Well, just to refresh your recollection, isn't it true that it was about September 1st or thereabouts that the corporation papers were organized?

A. Yes.

Q. And prior to that time what business were you engaged in? A. Used car business.

Q. And where was that used car business located? A. 1982 Kalakaua Avenue.

Q. And is that the same place where Lantis Motors, Limited, was opened up?

A. No, sir.

Q. Where was that opened up?

A. 800 South Beretania.

Q. And that Maluhia U-Drive, 1982 Kalakaua, that's out in Waikiki, is it not? A. Yes.

Q. And do you have any recollection of Mr. Abreu here working for Lantis Motors, Limited?

A. Yes.

(Testimony of Robert Nelson Lantis.)

Q. And do you recall approximately when he came to work for Lantis Motors, Limited?

A. It must have been about September.

Q. Of 1946? A. 1946.

Q. That was, then, right after the corporation was organized? A. It was just started.

Q. And at that time or after the corporation was organized, during the time of its incorporation, what was your official capacity in the corporation?

A. President, treasurer.

Q. And were there any other officers?

A. Yes, we had the regular officers, secretary and vice-president.

Q. Who was the vice-president and secretary?

A. Jack Russell.

Mr. Hoddick: I object. I think we are going too far afield there. We are not interested in the corporate structure of the Lantis Motors, Limited. It is immaterial and irrelevant.

Mr. Ridley: This is just preliminary, your Honor, to lay the background for the witness' recollection and to fix the time. That's all. [53]

The Court: Go ahead.

Q. Now, then, do you recall how long Mr. Abreu worked for the corporation?

A. Approximately six months.

Q. Do you of your own knowledge have any idea as to when he terminated his employment with the corporation?

A. He left some time in May, I think it was.

(Testimony of Robert Nelson Lantis.)

Q. Well, were you present at the time that his employment was terminated? A. Yes.

Q. And at that time in May were you still connected with the corporation? A. Yes.

Q. And from there on—May, 1947?—and from there on did you continue to be connected with the corporation? A. We were——

Q. Directly, I mean. A. Yes.

Q. Well, you mean to say from May to the summer, until the corporation closed, you were directly connected with them?

A. We were in negotiation with two other parties.

Q. Who ran the business there at the time of Mr. Abreu's termination?

A. Mr. Russell and Mr. Cyles took over. [54]

Q. When did you actually terminate your management of that business out there, approximately?

A. Around the same time, in June, May or June.

Q. I see. So that between the time the corporation was organized up until the time that, up until May or June, you were the president and manager of the corporation, is that correct? A. Yes.

Q. And as president and manager of the corporation you ran the business, is that correct?

A. We ran it, a corporation, yes.

Q. And it was about the same time that you left that Mr. Abreu left, as I understand your testimony? A. Yes.

(Testimony of Robert Nelson Lantis.)

Q. All right. Now, do you recollect the transaction involving this jeep in the present case?

A. Yes.

Q. When did you, what was your first connection with the actual obtaining of that jeep? When did that take place and under what circumstances?

A. Well, he started to work a short time when he came to me and told me he had a number to buy surplus vehicles. And I said, well, that doesn't involve me in any way. Well, he said, I'd like to have it and would you make me a loan to buy it? And he was a pretty good mechanic. I kind of liked him. And I thought, well, told him he could work out the debt to me. I'd take it out of his wages some way through the company. So when the number come up, why, he came up with the papers, showed me what he was going to get. It was either a jeep or a truck. And it turned out when he brought it into the company it was a jeep. It was the first time I had seen it.

Q. Now, I call your attention to this document here, U. S. Exhibit No. 1, purporting to be the original application by Mr. Abreu for surplus property. Did you ever see that document before?

A. Not that one.

Q. Did you ever go down to the surplus office with Mr. Abreu when that document was signed? Look at it. (Showing exhibit to the witness.)

A. No, I never went down there once.

Q. I call your attention to another document,

(Testimony of Robert Nelson Lantis.)

dated November 12, 1946, purporting to be a veteran's purchase order. Did you ever see that document before?

A. Yes. That's the one he brought back from the surplus office and showed me that he was getting a jeep, that he would secure a loan through that.

Q. Was all that writing there at the time he brought it back to you? A. Yes. [56]

Q. And where did he show that to you?

A. In the office of Lantis Motors.

Q. Did you have anything to do with the filling of this thing out?

A. No, I didn't. It is none of my writing out there. It was all filled out when he brought it.

Q. Was the \$325 noted on there?

A. Yes, that was the amount he wanted.

Q. I see. Well, did you at any time agree to loan him the \$325 so he could purchase this jeep?

A. I promised him if he worked good I would make him the loan. If I done as registered owner—

Q. Following the loan, U. S. Exhibit 2, did you in fact loan him the \$325?

A. Repeat that.

Q. Did you in fact loan him this \$325, and if so, when?

A. At the time when he went down to pay for the jeep I loaned him the \$325.

Q. Was that before or after?

(Testimony of Robert Nelson Lantis.)

A. Oh, this? With this on it? When he showed me what the amount would be.

Q. You are familiar with veteran's priorities?

A. No, I am not.

Q. Well, are you familiar with purchases from the [57] surplus property office?

A. No, I am not. I am not a veteran so I don't know.

Q. Well, are you yourself familiar with the purchases over there with the surplus property office as to how you go about it and who you see and everything of that nature? A. No, I am not.

Q. Have you ever made any purchases from the surplus property office through other parties than yourself? A. Prior to this, no.

Q. Well, have you since that time?

A. Yes.

Q. And who have you made your purchases from? A. Through veterans dealers.

Q. And now, calling your attention to U. S. Exhibit No. 3, did you ever see that document or a signed copy thereof?

A. I saw it when he brought the jeep in. That's when he got the money——

Q. Did you go down with Mr. Abreu to the surplus property office when this thing was signed and filled out? A. No.

Q. Now, then, did you ever go out—withdraw that. You stated that a jeep was in fact purchased and you loaned the \$325? A. Yes. [58]

(Testimony of Robert Nelson Lantis.)

Q. All right. When was it that you first saw that jeep?

A. A few days after he showed me the purchase order and I loaned him the money.

Q. And what happened then? Where did you see him?

A. He brought it into the garage.

Q. What condition was it in?

A. Bad shape. It didn't run. Two front wheels were gone, if I remember correctly. No top.

Q. Had you been in the business of selling used cars prior to that time? A. Used cars.

Q. How long prior to that time had you been engaged in that business?

A. Well, here about a year.

Q. Were you familiar with the prices of used cars and jeeps, and so forth, during about around that period of time? A. Yes.

Q. As to what you could get for them? Well, from your recollection as to the condition of that jeep, what was its market value at the time it was brought to Lantis Motors, Limited?

A. Well, all I could see was good was parts, about \$150. The motor was no good. [59]

Q. Did you have any discussion with Mr. Abreu relative to that purchase of that jeep after he came back to the office of Lantis Motors, Limited?

A. Well, I was disappointed in his judgment. I told him, how do you expect to get it to run? You'd lose money on the deal.

(Testimony of Robert Nelson Lantis.)

Q. What did he say, if anything?

A. Well, he said, leave it up to me; I can fix anything. Well, I had a lot of faith in him and thought he could.

Q. Well, was anything done relative to registration of that jeep with the City and County Treasurer's Office?

A. Yes. I'd say a few, or maybe a week or so later, why, we had to get it weighed, so it was sent down. I think he took it down with some of the boys in the garage to get it weighed, if I remember. I don't know who took it down. And he brought the weight slips back. And he and I together went down to the City and County.

Q. I see. And calling your attention to Exhibit 4-A, 4-B and 4-C, and No. 5 for the U. S. Government, were any of these documents involved in the registration of that car at that time?

A. This was the document to show that he had purchased the jeep.

Q. And you are referring now to plaintiff's or U. S. [60] Exhibit No. 5, is that correct?

A. Yes.

Q. Is that what you took down to the City and County Treasurer's Office with Mr. Abreu?

A. That's all we had.

Q. All right. And did you have the car registered down there when you took it down?

A. Yes.

Q. In whose name was it registered?

(Testimony of Robert Nelson Lantis.)

A. It was registered in his name.

Q. And was there any immediate registration thereafter with yourself and his name, both?

A. Right at that time I went on as legal owner to secure the loan. I told him I'd have to do that.

Q. And calling your attention to Exhibit 4-C, is that the first registration in his name?

A. Yes, that is the first one.

Q. And did he at that time sign off and you signed on, sign off as legal owner and you signed off as registered owner?

A. Yes, we did it right there.

Q. And was it immediately thereafter that you got Exhibit No. 4-B where you registered as legal owner and Mr. Abreu registered as the registered owner?

A. Yes, right there they gave the white and yellow— [61] they gave the white to him and I took the yellow for my record.

Q. And where was the jeep at that time?

A. It was up in the garage.

Q. And was it in running condition?

A. No.

Q. Well, did it ever get into running condition?

A. About three to four months later.

Q. And who fixed it?

A. Well, it was fixed there in the garage by mechanic Mr. Abreu.

Q. And when you say the garage, whom did the garage belong to?

A. Lantis Motors.

(Testimony of Robert Nelson Lantis.)

Q. That's Lantis Motors, Limited, a Hawaiian corporation? A. Yes, sir.

Q. And do you remember, do you recall approximately the date that it was fixed up, what time, or approximately?

A. The first time it was fixed was about the time when he left, around in May.

Q. Was it fixed at that time?

A. Approximately. It broke down every time he got it fixed. Something was wrong with it.

Q. You mean it was fixed before and broke down? [62] A. Yes.

Q. When it was fixed, who operated this particular jeep? Who operated it when it was fixed?

A. Well, he used it to run parts in, to go home at night.

Q. Now, then, on May 7th you said you left—not May 7th—around the month of May or June you left Lantis Motors, Limited, on account of the dispute with the stockholders?

A. That's right.

Q. Where did you go over from there?

A. Over to the U-Drive.

Q. At that time Mr. Russell took over the management and you went over and managed your own personal business, is that correct? A. Yes, sir.

Q. Now, all right. At that time did you take any of your stuff, parts or personal property, away from Lantis Motors, Limited, over to where you had your personal business?

(Testimony of Robert Nelson Lantis.)

A. Yes, we took some of the cars, plus I took this jeep over there.

Q. And you took the jeep over at that time?

A. It was still under repair; something else wrong.

Q. How did you happen to take that jeep over at that time?

A. Well, they wanted to sort of clear over the garage, [63] this new organization which we had would start fresh in there.

Q. And was the jeep at that time in running condition? A. No.

Q. And thereafter did you do anything in reference to the jeep?

A. Well, I tried to repair it. We had to get a new clutch for it. In the meantime I tried to get a hold of Mr. Abreu who had quit previously, tried to get some of the money out of it or else transfer it over to myself, whatever he wanted to do. I wanted to see what he would do about the jeep.

Q. Well, did you ever finally get a hold of him relative to collecting your loan?

A. About the latter part of June I ran across him.

Q. And where was that?

A. Coming out of Beretania Motors where he had gone back to work for this company.

Q. Did you make demands for the money?

A. Yes.

Q. What did he say, if anything?

(Testimony of Robert Nelson Lantis.)

A. He said he couldn't pay it; you just keep the jeep and call it square.

Q. And what happened as a result of that statement on his part? Did you take over the jeep?

A. He went over to the U-Drive where I had the title [64] and he signed it over to the U-Drive in my place.

Q. And when you are saying about signing over, you mean he signed off on the back of U. S. Exhibit No. 4 here? Just look at this one, U. S. Exhibit No. 4. Is that the document you are talking about, the certificate of title where you appear as legal owner and Abreu appears as registered owner?

A. That's the one he signed off.

Q. And approximately when did you say he signed off on that?

A. Around the first of July.

Q. And that was in payment of this loan?

A. That's right.

Q. Was there any other money involved besides that \$325 loan?

A. Yes, he owed a bill to the previous company, Lantis Motors, of around \$57.

Q. And was that considered in this transaction of the transfer of the vehicle to you? A. Yes.

Q. Or was that only, did that only involve the \$325?

A. Well, that was some of the repairs in an accident he had with another vehicle down there that we charged him for through the company.

(Testimony of Robert Nelson Lantis.)

Q. Now, then, you recall now approximately when it [65] was? I notice there is a date on here, July 15th, stamped on here, apparently by the Treasurer's Office. With that date in mind, does that refresh your recollection as to approximately when Mr. Abreu signed off?

A. Yes, it does.

Q. Transferred the car to you?

A. I just happened to think about something. It must have been within less than ten days because you shall go down within a week to ten days to change the registration of any vehicle; that's the law.

Q. So this was some time in within ten days prior? A. A week to ten days.

Q. I notice you signed off there or signed off there as legal owner and——

A. They make out a new registration and make me both registered and legal owner.

Q. And you are on also as the new registered owner? You signed on as the new registered owner?

A. That was on the 15th.

Q. I see. Now, then, prior to taking a transfer of this car into your own in satisfaction of this loan to Mr. Abreu, did you have any discussion as to the propriety of that matter, as to whether it was legal or valid, with Mr. Abreu?

A. Well, he told me about, that he had some tickets [66] on the vehicle, and I told him, I said,

(Testimony of Robert Nelson Lantis.)

well, they are all taken care of. I usually take care of the boys' tickets when they were using them; specially if they got a parking ticket downtown I paid for the parking ticket. So he said, he asked if there are any more. I said, not that I now of. So to make sure, I had him call up the veterans office down at the Ala Moana some place and check to see if it was O.K. if he transferred it.

Q. And where did that call take place?

A. At Maluhia.

Q. And were you present?

A. I was there. And I later talked to the Veterans Administration.

Q. As a result of that conversation, when he called the veterans office, what did he tell you?

A. He said it was all right. And Mr. Abreu even mentioned, he said that he had no use for the jeep and he needed the money and he'd like to sell it anyway. And I said, well, go ahead.

Q. All right. Did you talk then to the veterans, the surplus property office, on the deal?

A. The Veterans Administrator.

Q. And you recall who you talked to down there?

A. A Japanese man. I don't remember his name.

Q. And what did you ask him? [67]

A. I asked him if it was all right for me to take over this vehicle, and he said yes, even go——

Mr. Hoddick: I object to whatever he was told by the surplus property officer. We have no way of cross-examining him. It is hearsay.

(Testimony of Robert Nelson Lantis.)

Mr. Ridley: If your Honor please——

Mr. Hoddick: We can't test this story that your witness——

Mr. Ridley: ——he can testify as to the fact that he called the surplus property office to find out whether it was O.K. to transfer it. As a matter of fact, that is part of the element in showing good faith, if your Honor please, or lack of any possible criminal commission in the matter.

Mr. Hoddick: Then I think Mr. Ridley should get hold of the surplus property man and come down here, if it was a proper transaction, and you can probably get anybody from the surplus to test the propriety.

Mr. Ridley: That isn't the point.

The Court: All right. Go ahead. But just keep away from too much hearsay.

Mr. Ridley: All right.

Q. Did you ever go down and inspect or look over this jeep at any time, either on behalf of Mr. Abreu or anyone else before the jeep was actually delivered to your shop?

A. No, sir, I never saw it before that time.

Q. Have you purchased jeeps subsequent to that time? [68] That is, from dealers, and so forth?

A. You mean before?

Q. No, either subsequent or around that time or since. A. Since, yes.

Q. You have had an opportunity to go out and inspect them before you buy them?

(Testimony of Robert Nelson Lantis.)

A. I didn't. They bought them. I bought them off them.

Mr. Ridley: You may cross-examine.

Cross-Examination

By Mr. Hoddick:

Q. Mr. Lantis, where is this jeep now, do you know?

A. No, I don't. It was sold several months after I acquired the registration in July.

Q. Sold some time in 1947?

A. Some time.

Q. How much did you sell it for?

A. I don't remember. We sold several cars together as a unit; approximately brought back three hundred fifty or four hundred dollars.

Q. The jeep itself did or all three cars together?

A. Well, it's hard to say there. I don't even remember what cars were sold.

Q. Can you tell us to whom you sold it?

A. I sold it to this party that was buying them, going to some outside island. I don't know whether it was Japan or down one of the other lower islands.

Q. Do you remember his name?

A. No, I don't.

Q. Do you remember what kind of cars you sold him?

A. I sold him various, several jeeps and I think it was another surplus vehicle, command car.

Q. By "several jeeps" you mean two jeeps?

(Testimony of Robert Nelson Lantis.)

A. Two jeeps.

Q. And one other vehicle? And do you remember what the total price was for all three?

A. No, I don't.

Q. And you say he said he was going down to the Pacific island some place?

A. That's right.

Q. You don't remember his name?

A. No. They had an "ad" in the paper when he come around. I wanted to get rid of the jeep. It was sitting around, no good.

Q. You never had any other business dealings with him? A. No.

Q. Was the jeep running at the time you sold it to him? A. No, it wasn't.

Q. Do you know what was the matter with it?

A. The clutch went out on it again.

Q. Something which would require how much in the way of repairs?

A. Maybe a hundred dollars.

Q. Do you know what jeeps were selling for in 1947?

A. Good ones sold for so much; junk for another price.

Q. How much did good ones sell for?

A. About four, five hundred.

Q. That was the maximum price you could get for a good jeep in 1947?

A. Approximately around that. I think there was some sort of a top price on them—I don't think

(Testimony of Robert Nelson Lantis.)

there was any time. I don't know whether it was.

Q. You say you never went down to Iroquois Point when these jeeps were picked up?

A. No, sir.

Q. And you say Abreu left the employ of Lantis Motors before you turned over the concern to this Russell and the other chap?

A. Yes, sir.

Q. He left your employ, in other words? And he later went back to work for Beretania Motors?

A. Yes.

Q. Did you work for Beretania Motors?

A. Never. [71]

Q. And you left there about May of 1947?

A. Yes.

Q. And you say that Abreu came to work for you in about the first of September '46?

A. That's right.

Q. Now, just to clear up any confusion in the record, I think you also said on direct examination that Abreu had worked for you for 26 months?

A. No, I didn't.

Mr. Ridley: Six months.

Mr. Hoddick: My error.

Q. You were engaged in the U-Drive business in Lantis Motors, weren't you?

A. Yes.

Q. And what kind of cars did you use in that U-Drive business?

A. Mostly sedans and convertibles.

Q. You used some jeeps?

A. Never.

Q. Never used any jeeps?

A. No.

(Testimony of Robert Nelson Lantis.)

Q. How many jeeps did you have there at Lantis Motors?

A. They had one for parts and one other.

Q. Do you remember what you paid for them?

A. No, I don't. [72]

Q. You have no idea?

A. No, I don't remember.

Q. Do you remember where you purchased them?

A. They were purchased from veterans dealers.

Q. Are you familiar with the set of forms which veterans had to file with the surplus property office in order to obtain surplus property?

A. No, sir.

Q. Had you ever seen a purchase order before you saw the one that has been admitted in evidence in this case today?

A. No, sir.

Q. Have you ever seen any since?

A. No, I haven't, not of that type.

Q. Have you seen any purchase orders that were used by the surplus property office?

A. Yes, the purchase orders after—we were allowed as dealers to buy. They gave us purchase orders. Any dealer could buy the vehicle in the last year or so.

Q. And when you submitted the purchase orders to the surplus property office, what happened to it? That is, when you were ordering a particular type of surplus property.

A. Well, they sent us a bid form, and then, if we wanted to bid, we put in the bid we wanted and a

(Testimony of Robert Nelson Lantis.)

purchase order along with it if we got the bid. If you got the bid you didn't get anything. I mean, if it was too high you didn't [73] get anything.

Q. Now, Mr. Lantis, do I understand correctly that Mr. Abreu came and asked you for the \$325 at the time that he showed you this purchase order?

A. This purchase order, this white one here?

Q. This is the notice of sale. I am talking about U. S. Exhibit No. 2.

A. That is the one. That is the one he showed me.

Q. That's the time when he asked you for the \$325?

A. Yes.

Q. And where did you give him the money?

A. In the office there at Lantis Motors.

Q. You never went down to the surplus property office with him?

A. No, sir.

Q. This purchase order was completely filled in at that time, or at least all the writing that is on there now?

A. All the writing was there that I can remember.

Q. Mr. Lantis, have you ever been convicted of a felony?

A. Yes.

Q. Where?

A. Here in the Territory.

Q. Federal Court?

A. Yes.

Q. What was the felony? [74]

A. It had to do with a corporation, and I took the brunt myself.

Q. Theft of Government property?

(Testimony of Robert Nelson Lantis.)

A. No.

Q. Was that the charge?

A. No, it wasn't a theft of Government property.

Q. Receipt of stolen property?

A. Receipt of stolen property.

Mr. Hoddick: No further questions.

Mr. Ridley: That's all.

(Witness excused.)

Mr. Ridley: We rest.

Mr. Hoddick: May it please the Court, the defense witness has made certain statements which I think are within our ability to rebut. If we can have an adjournment until this afternoon, I think we can dig up the rebuttal witness that we will require.

The Court: Well, what time this afternoon?

Mr. Hoddick: Might I suggest two o'clock, your Honor? We can close the case today, I am sure. We had not anticipated this testimony on the part of the defense witness.

The Court: All right. The Court will recess until two o'clock.

(The Court recessed at 11:20 a.m.) [75]

Afternoon Session

(The Court convened at 2:10 p.m.)

Mr. Hoddick: May it please the Court, there were two witnesses whom we desired to call for re-

buttal. I have ascertained during the period of recess that one witness is in school on the mainland, and I just had a phone call from the other witness about seven minutes ago, and he is on his way down. Now, that has to do with the signing of the purchase order by the witness Abreu in Lantis' presence. If the Court desires to recess the matter again for a sufficient period of time for that witness to get here——

The Court: He is coming down from where?

Mr. Hoddick: He was called from Manoa valley and he is on his way down.

The Court: Well, how is he coming?

Mr. Hoddick: He is driving, your Honor.

The Court: Riding?

Mr. Hoddick: Driving. As of five minutes ago he expected to get here in 20 minutes. I regret that it was necessary for us to ask for a further continuance, and I am not certain when he gets here whether his evidence is going to be material or helpful either to the defendant or the plaintiff. Perhaps your Honor would prefer that we go ahead with argument at this time?

The Court: Well, didn't you find out the nature, what [76] the nature of his evidence would be?

Mr. Hoddick: We expect that the nature of his evidence will be that at the time that the U. S. Exhibit No. 2, which is this veteran's purchase order and which the witness Abreu testified he signed when it was not filled in, a blank form, and which

the defendant testified the witness Abreu brought to him after it had been completely filled in, that the witness who is coming down will testify that he was present at the time that Abreu signed this and he may be able to testify as to what the condition of the purchase order was at that time. Of course, it is the Government's theory of that that after Abreu signed his name on this purchase order the defendant either had filled in or filled in the rest of it and submitted it to the surplus property office. It is material insofar as that goes.

Mr. Ridley: If your Honor please, if the witness' testimony is to anything like that, it is certainly practically testifying to an impossibility. Where did all these figures come from? This thing was executed a day before this so-called notice of sale was executed. And if it is the same witness that I think it is, well, I will admit that you don't know what he is going to testify to.

Mr. Hoddick: I regret that the matter is in such a state of irresolution.

The Court: Well, we will take a 20-minute recess.

Mr. Hoddick: Thank you, your Honor.

(A recess was taken at 2:15 p.m.)

After Recess

Mr. Hoddick: Mr. Cambra, will you step up to the witness stand?

ANTHONY W. CAMBRA

a witness on behalf of the Plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Hoddick:

Q. Will you give your full name, please?

A. Anthony W. Cambra.

Q. How old are you, Mr. Cambra?

A. 28.

Q. Are you a veteran of World War II?

A. Yes, sir.

Q. Do you know Oliver Abreu?

A. Yes, sir.

Q. Are you related to him? A. Yes, sir.

Q. What is your relationship?

A. He is my uncle.

Q. He is your uncle? A. Yes, sir.

Q. Do you know the defendant in this case, Robert [78] Nelson Lantis? A. Yes, sir.

Q. And that is Mr. Lantis sitting here at the far end of the table? A. Yes, sir.

Q. Did you ever go down to Mr. Lantis' place of business in 1946? A. Yes.

Q. And where was that located?

A. Beretania Street, somewhere on Beretania in the back of the car barn, Rapid Transit.

Q. Do you remember the name of the business?

A. Lantis Motors.

Q. And what caused you to go down there? Why did you go down?

(Testimony of Anthony W. Cambra.)

A. Oh, now and then to see my uncle; to see him, Bob.

Q. Did you ever have any occasion to sign any forms in the defendant's office? A. Yes.

Q. Was your uncle there at the time?

A. Yes.

Q. Did he sign any forms at that time?

A. I think he did.

Q. What was the type of form that you signed?

A. I signed a big one and a small one. [79]

Q. Did it have anything to do with surplus property? A. Yes, sir.

Q. What type of a form was it? What was the form for?

A. For jeeps or trucks, I don't know. Some kind of surplus jeep.

Q. Is this the type of form which you signed when you were down there? Showing the witness U. S. Exhibit No. 2. A. Yes, that's it.

Q. That is the type of form?

A. That's the type of form.

Q. And did your uncle sign?

The Court: What are you showing him?

Mr. Hoddick: U. S. Exhibit No. 2, which is the veterans purchase order form, your Honor.

The Court: All right.

Q. Did your uncle sign the same type of form when you were there?

A. Yes. We had the same thing.

(Testimony of Anthony W. Cambra.)

Q. Now, was there any—was the form filled in at the time you signed it or was it in blank?

A. Mine was blank.

Mr. Ridley: If your Honor please, I will object to the question as calling for an answer that is incompetent, irrelevant and immaterial and having nothing to do with the issues in this case. This is the type of form he filled in. [80] There is obviously a form here, U. S. Exhibit "A," which is the only one in question, and that was obviously not signed by this witness.

Mr. Hoddick: U. S. Exhibit No. 2.

Mr. Ridley: U. S. Exhibit No. 2. It is not a proper foundation.

Mr. Hoddick: This is partially to refresh the witness' recollection as to this particular form. I will step from this question——

Mr. Ridley: That is not a proper way to refresh his recollection, to put words into his mouth and lead to the point that he is going to testify to something. If you ask him a question directly——

Mr. Hoddick: I will submit the matter.

The Court: Oh, well, I think that the question is a little bit afield.

Mr. Hoddick: I will withdraw the question.

Q. You were present at the time that your uncle filled in this form?

A. We two were there. We called in there into his office.

(Testimony of Anthony W. Cambra.)

Q. And you testified that this was the type of form that he filled in at that time?

A. That's right, same thing.

Q. Was there any other writing on the form at the time [81] that he filled it in?

A. No, mine didn't have no form——

Mr. Ridley: Just a minute. I move to strike that answer as not having any bearing on the issues of this case.

Q. (By Mr. Hoddick): I am talking about the form that your uncle signed, Oliver Abreu. Was this business relative to jeeps and material up here filled in on his form or was it blank?

A. No, it wasn't filled.

Q. It was a blank form?

A. Not that I know of. It was a blank form.

Q. Did you ask Mr. Lantis what use he was going to make of these forms?

Mr. Ridley: Just a moment, if your Honor please. I will object to that as leading and suggestive and no proper foundation has been made for it, and that it is not tied up to this particular transaction. I don't understand what counsel is trying to show here. If this is a round-about way to infer something that might possibly have existed which doesn't exist, he is surely going around it that way, but certainly that is not the proper way to produce criminal evidence.

(Testimony of Anthony W. Cambra.)

The Court: Well, as I get it, the witness testified that he and Abreu signed that form at the same time at the same place. [82]

Mr. Ridley: That's right.

The Court: Well, frequently I don't know for sure whether it is at the request of the defendant or not. I am not sure about that.

Mr. Hoddick: I will ask the witness about that, your Honor.

Q. Mr. Cambra, were you asked by anybody to sign that type of form and was your uncle asked by anybody to sign that type of form?

Mr. Ridley: If your Honor please, I will object to the question as being double. The question is solely in reference to this form signed by the witness Abreu. I call your Honor's attention to also in this connection to this round-about way. Mr. Abreu never testified to the presence of any other witness in that office at the time he allegedly signed this. So how can we be sure that this is the same form? There is no foundation laid for this rebuttal at all.

Mr. Hoddick: Our witness testified that he only signed one of these forms one time. He was there at the time that his uncle signed such a form.

Q. Who asked your uncle to sign this form?

A. I think Lantis did. He called us in the office. It was in the afternoon some time.

Mr. Ridley: I move to strike that answer, if

(Testimony of Anthony W. Cambra.)

your Honor please, as being purely speculative and conjectural. He [83] thinks that Mr. Lantis did.

A. (Continuing) Lantis called us in there. I know we signed some papers in his office in the afternoon some time.

Mr. Ridley: That is entirely a different answer than he originally gave.

A. (Continuing) I know he called us in the office to sign for some jeeps that they were going to get.

Mr. Ridley: Just a moment, if your Honor please. I will object to the witness going on and rambling. I have had an objection in before your Honor.

The Court: Let's have your objection again.

Mr. Ridley: I object to it, if your Honor please, that any statement on the part of this witness as to what he thinks might have happened is pure speculation and conjecture, and he said he thought Mr. Lantis must have called him in.

The Court: No, he didn't say he thought Mr. Lantis; he said quite definitely Mr. Lantis.

Mr. Ridley: Called him in. But he said he thought Mr. Lantis requested him to sign this. And that was what the question was, if your Honor please, and that is speculative.

The Court: The way I got it, he said he thought he asked Abreu to sign it. He didn't testify as to whether he had been asked to sign it.

Mr. Ridley: Well, I am talking about Mr. Abreu,

(Testimony of Anthony W. Cambra.)

and [84] that is the question that is involved in this case, if your Honor please, and that is speculation and conjecture.

Mr. Hoddick: Well, let's rephrase the question, Counsel. Perhaps we can avoid these multifarious objections.

Q. You said that you and your uncle signed certain forms in Mr. Lantis' office?

A. We did.

Q. Where did those forms come from?

A. I don't know where he got it from.

Q. Did Mr. Lantis have the forms?

A. He had the forms there in the office.

Q. And Mr. Lantis gave the forms——

A. To us in that desk in that office that he had in that Lantis Motors. I know Abreu signed because they went down to get some jeeps.

Q. And did this form have any writing on it other than the printed writing on it prior to the time that your uncle signed it? A. No.

Mr. Hoddick: No further questions.

Cross-Examination

By Mr. Ridley:

Q. Do you know what date this occurred?

A. Oh, long time ago this be—nineteen something, I don't know. [85]

Q. That's right. And, as a matter of fact, this whole transaction is sort of hazy in your recollection, isn't it? You don't remember all the details concerning it, do you?

(Testimony of Anthony W. Cambra.)

A. Well, as far as that, I remember he calling us for jeeps.

Q. That's right. You remember that?

A. Yes.

Q. The rest of it is sort of hazy in your recollection except as to what you did?

A. Not quite anything. I can remember far back.

Q. I understand that. But do you remember, do you have any definite recollection as to what the conversation was at that time?

A. Concerning jeeps.

Q. That's all? A. Surplus jeeps.

Q. And that's all you know?

A. That's all. And he made us sign that, that's all.

Q. And that's all you recall?

A. Signing papers.

Q. You don't know whether it was this particular document that was signed by your uncle, do you? A. That's the same thing I had.

Q. I say, you don't know whether this particular form was the one that was signed by your uncle at that time, do [86] you?

A. I remember that's the one.

Q. That's the particular one? You are definitely certain of that?

A. He signed something like that.

Q. Do you mean to state——

A. He says he signed. I'm looking at it now.

(Testimony of Anthony W. Cambra.)

Q. You say that that's the particular document that he signed?

A. I don't know if that's the one, but he signed one like that.

Q. One like that? He could have signed this particular document on another occasion, couldn't he?

A. I don't know.

Q. He could have signed it on another occasion?

A. Not when I was there. I don't know.

Q. Isn't it possible, Mr. Cambra, that your uncle may have signed another form like this on another occasion?

A. I don't know.

Q. You don't know? You can't definitely testify that it was this document that he signed on that particular occasion that you were present, can you?

A. He signed one like that.

Q. One like it, but you don't know whether it was this particular document, do you? [87]

A. Well, it was blank. I don't know.

Q. Do you know whether this is the same document that he signed, whether it was blank or not blank?

A. The one he signed was blank.

Q. Well, therefore, take a look at this particular document. I don't care whether it was blank or otherwise. Do you know whether that was the same one that he signed that time?

A. Well, whose writing is on the top there?

Q. That's aside from the point. Take a look at the document. Do you know whether that was the particular one that he signed in your presence?

(Testimony of Anthony W. Cambra.)

A. I don't know if the particular one, but he signed something like that.

Q. In other words, you don't know whether it was this document, referring to U. S. Exhibit No. 2?

A. I didn't notice that number there. It didn't have a number like that. I don't notice those things.

Q. How did you happen to come down here today? A. I was called down here.

Q. Who called you down?

A. My boss told me to come down.

Q. Who is your boss? A. Kumukoa.

Q. And you talked to your uncle, Mr. Abreu, about [88] this case here before you came on the stand here? A. No.

Q. Never talked to him before? A. No.

Q. Have you ever had any occasion to discuss it with him in the past? A. No.

Q. In other words, the last time you talked to Bob or had anything to do with this case or do with any buying——

A. Just now they called me. I was in the U-Drive. We are in the telephone there——

Q. O.K. Admitted. But the last time you knew anything about your uncle signing any form was 'way back in 1946? A. 1946 some time.

Q. And this is the first time anybody has ever discussed any similar matter with you, is that correct? A. That's right.

Mr. Ridley: That's all.

(Testimony of Anthony W. Cambra.)

Mr. Hoddick: No further questions.

The Court: That's all.

(Witness excused.)

The Court: Is that your case, then?

Mr. Hoddick: Your Honor, I would like to recall Mr. Abreu on the stand.

The Court: For what? [89]

Mr. Hoddick: For the purpose of placing in the record definite information that he only signed one veteran's purchase order form.

The Court: He testified so.

Mr. Hoddick: He did. The Government rests.

The Court: Well, do you gentlemen want to argue the case?

Mr. Hoddick: I will pass the opening argument, your Honor.

(Mr. Ridley presented the argument on behalf of Defendant.)

(Mr. Hoddick presented the argument on behalf of Plaintiff.)

The Court: It is the finding and judgment of the Court that the Defendant is guilty as charged on count 1 and count 2. When will the Defendant be ready for sentence?

Mr. Ridley: Well, if your Honor please, first may we have an exception to your Honor's ruling on the grounds that it is not according to the law and the evidence and the weight of the evidence.

And, if your Honor please, we can be ready for sentence in more or less the convenience of the Court.

The Court: Mr. Mattoon, how long will it take you to make an investigation and presentence report? [90]

Mr. Mattoon: By Friday, the 14th, your Honor.

The Court: All right. Ten o'clock in the morning, Friday, the 14th.

Mr. Hoddick: Your Honor, may I have leave of Court to withdraw the exhibits which were brought over here from the Territorial Department of Motor Vehicles, so that I can return them? That's U. S. Exhibits 4-A, B and C, and U. S. Exhibit No. 5. They will always be available.

The Court: You can.

Mr. Hoddick: If I have copies prepared.

The Court: Yes.

Mr. Hoddick: All right. I will have that done. I will have photostatic copies made, your Honor.

The Court: All right. Is there anything else before the Court?

The Clerk: No, your Honor.

The Court: The Court is adjourned until tomorrow morning at ten o'clock.

(The Court adjourned at 3:25 p.m.)

I, Albert Grain, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript

of proceedings in Criminal No. 10,210, U.S.A. vs. Robert Nelson Lantis, held in the above court on October 4, 1949.

/s/ ALBERT GRAIN.

Jan. 3, 1950.

[Endorsed]: Filed Jan. 6, 1950. [91]

In the United States District Court
For the District of Hawaii

Criminal No. 10,210

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT NELSON LANTIS,
Defendant.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held at Honolulu,
T. H., December 7, 1949, at 10:00 a.m.

Before: Hon. Delbert E. Metzger, Judge.

Appearances:

HOWARD K. HODDICK,

Assistant United States Attorney,
appearing for the Plaintiff.

DANIEL G. RIDLEY, ESQ.,

Honolulu, T. H.,
appearing for the Defendant.

PROCEEDINGS

The Clerk: Criminal 10,210, United States of America vs. Robert Nelson Lantis, for hearing on a motion for a new trial.

Mr. Ridley: If your Honor please——

The Court: Let me see the file.

(Document handed to Court.)

Mr. Ridley: My co-counsel, Mr. Herbert Lee, just left for the Mainland and is on the Mainland for two weeks or so vacation; therefore, I was unable to have him present today.

My affidavit forms the basis of part of this motion for a new trial. It is just merely to the effect that I didn't know of the witness Cortese prior to the last trial; and I would like to state to the Court I made every effort to locate all witnesses and I was unable to locate these particular witnesses, and I didn't know they knew anything about the matter, with the information I was able to obtain.

With that understanding, I don't want to be dis-

qualified on proceeding with the cause at the present time, if Counsel will accept my statement in that regard.

Mr. Hoddick: I am not worried so much about Mr. Ridley's knowledge as to what these witnesses might be able to testify to as I am about his client's knowing. If these witnesses had something important to say, it is apparent that what they will testify to, at least as far as Mr. Russell, who is named in Mr. Lantis' affidavit, is knowledge which Mr. Lantis had, and if Mr. Lantis considered it important, he certainly should have had Mr. Russell in here. I don't say that Mr. Lantis had informed Mr. Ridley of that. I don't know what Mr. Ridley's knowledge was, but his client had the knowledge, and I think this is a rather late hour in which to bring in what he classifies as newly discovered evidence.

Also, I believe that the argument on this motion for a new trial should be limited to the subject of newly discovered evidence since the other grounds set forth in the motion were not brought to the attention of this Court within five days after the time that the defendant was adjudged guilty. Under the Federal Rules of Criminal Procedure, Rule 33, the only ground that you can argue after that five-day period is the ground of newly discovered evidence.

Mr. Ridley: The only point in that connection, if your Honor please, is that I happen to know all the history of the background of the whole situation involving all of the witnesses, involving the

company, and everything to that effect; and, as I understand the rule, counsel can not very well argue something that is going to involve himself as a witness. I am perfectly willing to proceed at the present time if counsel will waive that disqualification. I realize quite well, if your Honor please, that the primary question involved is as to whether Mr. Lantis had this information or whether it was [2*] available to him, but I don't want to be placed in a position of not being able to take the stand on account of the fact that my co-counsel, who would have normally presented this motion, is not present. I don't wish to delay the matter and, if necessary, I can probably get other counsel within a short length of time and familiarize him with the case, but it takes a few hours.

Mr. Hoddick: Mr. Ridley, I have no objection to your taking the stand, but I don't see how that would assist you in this matter. The question is whether your client, Mr. Lantis, had knowledge and how he obtained the knowledge after the trial. You can put Mr. Lantis on the stand for that purpose.

Mr. Ridley: But the knowledge of myself acting here as attorney for Mr. Lantis would be Mr. Lantis' knowledge as I understand the law. In other words, if I made the investigation myself and was unable to elicit any information from a particular witness which I am now able to produce, it would seem to me that my knowledge prior to that time would be Mr. Lantis' knowledge, if your Honor please.

* Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Hoddick: Well, Mr. Lantis has set forth in his affidavit the finding that a Mr. Russell has a receipt. That is something which Mr. Lantis must have had direct knowledge of at the time that the receipt was executed.

Mr. Ridley: If you recall correctly, Mr. Hoddick—— [3]

Mr. Hoddick: One second. I think I would like to ask at this time for the exclusion of any witnesses who may be in the court room.

Mr. Ridley: No objection.

(Witnesses leave.)

The Court: Well, now, Counsel for the Government says he has no objection to your being a witness in the case if you deem it proper to be a witness.

Mr. Ridley: Well, that is the matter, if your Honor please, that I was raising at this time.

Mr. Hoddick: May it please the Court, in the interest of shortening this proceeding, could we have a ruling on what subject matter will be open to the defendant to argue at this time. In his motion for a new trial he alleges newly discovered evidence in paragraphs 1 and 2. Paragraph 3 runs to another question. And as to paragraphs 4 and 5, I do not think that the defendant should be permitted to argue the subject of paragraphs 4 and 5. I do not think that the defendant should be permitted to argue the subjects of paragraphs 3, 4 and 5 since these matters were not brought to the Court's atten-

tion within the five-day period as prescribed by Rule 33.

The Court: Well, why don't you move against him then?

Mr. Hoddick: Well, I would like to move at this time that there be no granting of this motion on the grounds set forth in paragraphs 3, 4 and 5 of the defendant's motion for a new trial on that ground.

Mr. Ridley: I am inclined, if your Honor please, to concede that under the strict construction of the rule that is correct.

The Court: What do you mean by "strict construction"?

Mr. Ridley: As I understand the Federal rule, if the motion is not filed before five days after the final judgment of the Court upon a particular or general grounds as alleged, paragraphs 3, 4 and 5, then it becomes too late and thereafter the only grounds is newly discovered evidence, which may be filed at any time up to within two years after the matter is done.

The Court: I think that is right. All right, we will entertain you on paragraphs 1 and 2.

Mr. Ridley: I would like to amend paragraph 1 in the motion for a new trial to include an additional witness, Marvin Boggs, whom I have just discovered.

The Court: Who? Marvin——

Mr. Ridley: Boggs (spelling) B-o-g-g-s, whom I just discovered and talked with the first time this morning, who I just discovered was willing to tes-

tify, or would testify, to knowledge of the facts involved in this case last night on communication from Mr. Lantis. [5]

The Court: I didn't get the last.

Mr. Ridley: I say, the first time I had information or could obtain any information that that particular witness had knowledge of the facts in this case was last night after a telephone call from Mr. Lantis, and the first time I was able to interview him was this morning at 9 o'clock. I might state that prior to that time I had talked to the witness and from my conversation with him before the trial of this case, he had indicated that he didn't care to discuss the matter or had no knowledge that would help.

The Court: You want to amend paragraph 1 to include Marvin Boggs?

Mr. Ridley: That is correct.

The Court: And what do you allege he would testify to?

Mr. Ridley: He will testify, if your Honor please, to the effect—from the story he gave me this morning—that he was present on or about the end of the year—the facts in the record show it must have been following November 18—at the time this particular jeep was brought onto the premises of Lantis Motors, Limited, located at 800 Beretania Street, that prior to that time, through discussions with both Mr. Lantis and Mr. Abreu, or at least Mr. Abreu, that Abreu had told him, or indicated to him, that he had borrowed the money from Mr.

Lantis, the \$325, to purchase the jeep; and there were [6] certain incidental facts leading *up that* that he will testify to, that Abreu wanted the station wagon to replace his old Ford vehicle, that following Mr. Abreu's bringing of this jeep to this shop, which was towed in because the motor was frozen, Mr. Abreu worked for a considerable length of time, up to at least a month thereafter, in putting the jeep in sufficient running order so that he could operate it; that he repaired the jeep on his own time at the shop of Lantis Motors, Limited, a Hawaiian corporation, located over here at 800 Beretania Street; that thereafter he used the jeep, after he got it repaired, to go to and from work, he having been working for Lantis Motors, Limited; that sometime during March or April of the year 1947 Mr. Abreu had to go to the hospital, or his wife was in the hospital, or something like that, but he did not work regularly at Lantis Motors, Limited; he was off for a considerable length of time; that around the latter part of April or the early part of May when Mr. Lantis more or less severed his connections with Lantis Motors, Limited, as far as management was concerned, when Mr. Cyles came into the picture, along with Mr. Russell, that this Mr. Abreu was not there at the time; that the jeep was lying around Lantis Motors, Limited, shop; that Mr. Cyles wanted the jeep moved, as well as Mr. Russell, so that he could get in there, and that Lantis or Mr. Boggs picked up the jeep and took it over to Maluhia U-Drive, Mr. Lantis' private

place of business on [7] Kalakaua Avenue; that the jeep lay around the premises for a considerable length of time under a palm tree, or something; that for a month or two thereafter Lantis attempted, through Mr. Boggs, to contact Mr. Abreu for the purpose of obtaining repayment of this loan of \$325; that finally sometime in the middle of the year—he doesn't remember the exact date—it appears in the record around July 1—sometime around the middle of the year either he or Mr. Lantis finally located Mr. Abreu, as a result of which Mr. Abreu came over to Maluhia U-Drive; and that following the discussion in which Mr. Abreu stated he had no money to repay the loan Mr. Abreu offered and Mr. Lantis accepted on July 1 to take a transfer of the jeep into Mr. Lantis' name in lieu of the indebtedness.

Mr. Hoddick: May it please the Court, as to the offer which Mr. Ridley has just made concerning testimony of Mr. Boggs, and also in connection with the affidavit of Mr. Cortese, which is filed with the motion for a new trial, I think that it is apparent that all of what Boggs would have to say is merely in the nature of testimony which would impeach, if offered, what Mr. Abreu testified to from the stand, and the same is true of the facts that Mr. Cortese has set forth in his affidavit. In addition to being in the nature of impeaching testimony, as far as Mr. Abreu is concerned, it would be cumulative testimony as far as Lantis is concerned, and there are innumerable decisions by the Federal

Courts in which it [8] has been held that neither impeaching nor cumulative evidence will be heard by the trial court in reviewing a motion for a new trial.

Mr. Ridley: In that connection, if your Honor please, I can't quite agree with Counsel for the Government that this is merely impeaching testimony. There is considerable substantive testimony, especially to the effect that Mr. Abreu worked on this automobile on his own time, if your Honor please, and testimony to the effect that it was common knowledge around the shop that it was Mr. Abreu's automobile. That is substantive testimony, if your Honor please, which was not available to us at the last trial—at least, I had no indication it could be available.

Mr. Hoddick: As far as working on his own time is concerned, I think the question of when he worked on the jeep is clearly immaterial. During the trial of this cause, as I remember—you obtained a transcript of it; I did not——

Mr. Ridley: I have not. The reporter has not furnished it to me as yet. I have ordered one.

Mr. Hoddick: As I recall, it did not specify whether Mr. Abreu worked on this jeep on his own time or on company time.

The Court: What was this man Boggs? What was his relationship with the shop there.

Mr. Ridley: Mr. Boggs—— [9]

The Court: What was the relationship with Lantis?

Mr. Ridley: Mr. Boggs, back at this period of time, as I understand it, was manager and general roust-about at Maluhia U-Drive on Kalakaua, which was Mr. Lantis' private business, and that in that capacity he had occasion constantly to go over to Lantis Motors, Limited, on 800 Beretania Street for the purpose of checking on the repairs of cars; and also because up until May, 1947 Mr. Lantis actively participated in the management of Lantis Motors, Limited, Mr. Boggs being his general assistant.

Mr. Hoddick: If the question of on whose time Mr. Abreu worked on this jeep should be considered material by the Court—and I don't think that it is—the testimony of Mr. Boggs is neither conclusive nor competent. It might show that Mr. Abreu did work on the jeep after hours, whether it was on his own time or Mr. Lantis' time, or anything else; but he certainly could not testify that Mr. Abreu did not work on the jeep on company time, unless it could be shown that Mr. Boggs was there all day.

Mr. Ridley: If your Honor please, that doesn't necessarily follow. Mr. Boggs had occasion to contact Mr. Abreu all along and he can certainly testify as to admissions by Mr. Abreu.

Mr. Hoddick: That is in the nature of impeaching testimony and is not competent to sustain a motion for a new [10] trial.

The Court: Go on to this second paragraph.

Mr. Ridley: Second ground, if your Honor please?

The Court: Yes.

Mr. Ridley: I don't have the copy of it with me. I understand the United States Attorney has a copy of the receipt that was involved in that original transaction that Mr. Lantis testified on the original trial he could not locate; and the receipt shows that this was a loan of \$325 repayable I forget how many days thereafter.

Now, the United States Government, at my request, after I found out about this copy, subpoenaed Mr. Russell who has had possession of this receipt all during this time, although he claims he recently discovered the same. The receipt should be here present in court under subpoena.

(Receipt produced.)

Mr. Ridley: Your Honor can take a look at the receipt. It is a receipt, if your Honor please, dated 11/18/46, No. 12699, Received from R. Lantis \$325 for loan to be repaid 12/1/46, Signed Oliver Abreu. That is the same date that that purchase order for the car was paid for to the Surplus Property office.

The Court: Well, was that receipt testified to by Lantis?

Mr. Ridley: That receipt, if your Honor please, was [11] testified to as follows by Mr. Lantis: He said in view of the length of time he thought he had such a receipt and was unable to locate any. And he said he was finally able to discover, due to outside circumstances, due to a longstanding friction between Mr. Lantis and Mr. Russell, where these books were located. All these books were Lantis Motor books and Russell only recently indi-

cated, apparently—I don't know what time the United States Government got this; I think it was after the last trial—that he discovered such a receipt and had it in his possession while looking over the books of Lantis Motors, Limited, which he had had in his possession for a year or two prior; and that was the receipt that we thought was in existence, but didn't know, at the last trial. Mr. Lantis said he thought he had a receipt, but he couldn't locate it in any of his files.

Mr. Hoddick: Mr. Ridley, did you check the transcript to see if Mr. Lantis did say that? I don't remember that.

Mr. Ridley: He said either a note or receipt, to my recollection.

Mr. Hoddick: I don't recall it, but I won't dispute your word if you did check the record.

Mr. Ridley: I did not check the record, if your Honor please, but that is my recollection of the testimony, and I am perfectly willing to stand corrected if I am wrong. [12]

Mr. Hoddick: It is the Government's position on that, your Honor, that regardless of whether receipt or note was mentioned at the trial of this case this entire affair was a scheme to enable Mr. Lantis to obtain a jeep by way of veterans' priority, whether for his personal use or use in his business, that the Government established such a scheme of conspiracy existed and that——

The Court: When was this case tried?

Mr. Ridley: October 4, if your Honor please, according to my recollection.

The Clerk: Fourth of October, your Honor.

The Court: Who was the reporter in that case?

The Reporter: Mr. Grain.

The Court: Is he here?

The Reporter: Yes.

The Court: Go and ask Mr. Grain to look up his notes of October 4 in the Lantis case and to bring them in, with particular reference to the testimony of Lantis, as well as Abreu.

Go ahead with the argument.

Mr. Hoddick: May it please the Court, first of all it is submitted that this was a conspiracy, that we proved the existence of that conspiracy, and that it would only be natural to expect—and as this Court well knows from other Surplus Property cases—that the person who is not the veteran [13] who is obtaining the property through a veteran would make some endeavor to disguise the true nature of the transaction and might very well give a receipt to make it appear as though the transaction were a loan; and that if the receipt is considered by the Court at this time it would not constitute such evidence as would have led to a verdict of acquittal on the original trial of this cause.

There have been cases which have held that before a motion for a new trial is granted on the grounds of newly discovered evidence that that newly discovered evidence must be of such caliber and weight that the Court in its discretion considers that a ver-

dict of acquittal would have been rendered if that newly discovered evidence had been introduced at the original trial.

It is also submitted that since this is a receipt executed by Mr. Lantis, it is a receipt which he had knowledge of; that Mr. Lantis knew where the books and papers of the company were and that he had every opportunity to supena those books and records in an endeavor to find that receipt if he wanted it. Therefore, he himself could not have considered it such important evidence in the case as to warrant going through that process in order to obtain it.

The Court: Mr. Grain, have you there the notes of the testimony of Robert Lantis on October 4 of this year in the case of the Government against Lantis? [14]

(Thereupon, Albert Grain, Official Reporter, United States District Court, District of Hawaii, read the direct and cross-examination of Oliver Abreu given October 4, 1949.)

The Court: I think that is enough.

The Reporter (Mr. Grain): Do you want Mr. Lantis' testimony?

The Court: No. The motion for a new trial is denied. It wouldn't have changed the finding and judgment of the Court had that receipt been put in the trial.

Mr. Ridley: May we at this time, if your Honor please, have an exception, and I would like to make a short offer of proof before your Honor's final ruling.

The Court: Well, I have ruled. You made your exception; it is in the record.

Mr. Ridley: For the purposes of the record, I don't think it is necessary, but we give notice of appeal at this time, if your Honor please.

* * *

(Thereupon, at 11:25 a.m. December 7, 1949, the hearing in the above-entitled matter was closed.) [15]

I, Lucille Hallam, Official Court Reporter, United States District Court, for the District of Hawaii, do hereby certify that the foregoing is a true and correct transcript of my shorthand notes taken in the case of United States of America, Plaintiff, vs. Robert Nelson Lantis, Defendant, Criminal No. 10,-210, December 7, 1949.

/s/ LUCILLE HALLAM,

Official Court Reporter.

December 9, 1949.

[Endorsed]: No. 12460. United States Court of Appeals for the Ninth Circuit. Robert Nelson Lantis, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed January 23, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12460

ROBERT NELSON LANTIS,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON BY APPELLANT ON APPEAL

Comes now Defendant-Appellant, Robert Nelson Lantis, and in conformance with Rule 19 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, and hereby states that it is intended that the Appellant shall rely upon the following points:

1. That the evidence is insufficient as a matter of law to sustain any count in the indictment;

2. That the Court erred in denying the motion for a new trial;

3. By reason of said errors and other manifest errors appearing in the record designated herein the judgment of conviction should be set aside.

Dated: Honolulu, T. H., this 17th day of January, 1950.

ROBERT NELSON LANTIS,
Defendant-Appellant,

By /s/ DANIEL G. RIDLEY,
/s/ J. EDWARD COLLINS,
Attorneys for Defendant-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed U.S.D.C. Jan. 17, 1950.

[Endorsed]: Filed U.S.C.A. Jan. 23, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE
PRINTED ON APPEAL

Now comes Robert Nelson Lantis, Defendant-Appellant in the above-entitled cause, and designates for inclusion in the printed record on appeal the following:

1. The indictment against Defendant.
2. Clerk's minutes of October 4, 1949 (the date of the trial).
3. Official reporter's transcript of evidence taken and proceedings had during the trial.
4. All Exhibits.
5. The judgment, commitment and sentence of the court.
6. Defendant's motion for a new trial and affidavits attached thereto.
7. Clerk's minutes of December 7, 1949 (the date of hearing on motion for a new trial).
8. Official reporter's transcript of hearing on motion for a new trial.
9. Oral order denying motion for a new trial entered on December 7, 1949 (included in clerk's minutes).
10. Notice of appeal (from the judgment of the court) filed December 15, 1949.
11. Notice of appeal (from the order denying Defendant's motion for a new trial) filed December 15, 1949.
12. Election (not to commence service of sentence of imprisonment) filed December 15, 1949.
13. Application for bail filed December 15, 1949.

14. Bail bond filed December 16, 1949.
15. Bond for costs filed January 17, 1950.
16. Defendant's second amended designation of record filed January 17, 1950.
17. Defendant's statement of points on appeal dated January 17, 1950.
18. This designation.

Dated: Honolulu, T. H., this 17th day of January, 1950.

ROBERT NELSON LANTIS,
Defendant-Appellant,

By /s/ J. EDWARD COLLINS,
/s/ DANIEL G. RIDLEY,
Attorneys for Defendant-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 23, 1950.

[Title of Court of Appeals and Cause.]

APPLICATION IN RE THE PRINTING
OF ORIGINAL EXHIBITS

Now comes Robert Nelson Lantis, Defendant-Appellant in the above-entitled cause, and hereby respectfully makes application that the original exhibits in this cause be not printed and that said

exhibits be considered by the Court in their original form.

Dated: Honolulu, T. H., this 7th day of February, 1950.

ROBERT NELSON LANTIS,
Defendant-Appellant,

By /s/ J. EDWARD COLLINS,
His Attorney.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge,

/s/ HOMER BONE,

/s/ WM. E. ORR,
U. S. Circuit Judge.

No. 12,460

IN THE

United States Court of Appeals
For the Ninth Circuit

ROBERT NELSON LANTIS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court,
Territory of Hawaii.

BRIEF FOR APPELLANT.

SMITH, WILD, BEEBE & CADES,
J. EDWARD COLLINS,

Bishop Trust Building, Honolulu, T. H.,

Attorneys for Appellant.

(FILED)

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PAUL R. QUINN

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No. 12,460

IN THE
United States Court of Appeals
For the Ninth Circuit

ROBERT NELSON LANTIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court,
Territory of Hawaii.

BRIEF FOR APPELLANT.

STATEMENT AS TO JURISDICTION.

This is an appeal from a judgment of conviction and from an order denying a motion for a new trial in the United States District Court for the District of Hawaii. The indictment is in two counts. The first count charges a conspiracy in violation of 18 U.S.C. § 80, the object of which conspiracy is to violate 18 U.S.C. § 80. The second count charges the commission of a crime in violation of 18 U.S.C. § 80 (R. 2-5). Both offenses charged occurred prior to September 1, 1948, the effective date of the present revision of 18 U.S.C.

The United States District Court for the District of Hawaii had jurisdiction of the cause by virtue of 18 U.S.C. § 3231. This court has jurisdiction of this appeal by virtue of 18 U.S.C. §§ 1291 and 1294.

STATEMENT OF THE CASE.

On March 23, 1949, the defendant, a non-veteran, was indicted by the United States Grand Jury for having conspired in October and November, 1946, with one Oliver Abreu, a veteran, for the purchase of a surplus vehicle from the Territorial Surplus Property Office, an office of a department or agency of the United States, for the defendant's use, under Abreu's veteran's priority. The defendant was also indicted for the substantive offense of causing a false statement to be filed in connection with the purchase. The trial was jury waived. Abreu, the other alleged conspirator, was not indicted and was the principal witness for the Government.

The defendant testified on his own behalf that he had loaned the purchase price to Abreu in order that Abreu could purchase the vehicle for his, Abreu's, use.

Only one transaction was involved. The purchase price of the jeep was Three-Hundred Twenty-Five Dollars (\$325). The only evidence of its value was furnished by the defendant who was in the auto repairing and car rental business. The vehicle being in a wrecked

condition (R. 61), he fixed its value at One-Hundred Fifty Dollars (\$150) (R. 83).

The defendant was convicted on both counts, the sentence being imprisonment for a year and a day on the conspiracy count, and a One-Thousand Dollar (\$1,000) fine on the second count (R. 8, 9).

A motion for a new trial on the ground of newly discovered evidence (R. 10-17) was denied after hearing (R. 112-126). Appeal was taken from the judgment of conviction on the basis that it was unsupported by the evidence, and from the order denying the new trial (R. 18-22).

The principal point urged by the appellant is that the evidence interpreted most favorably to the Government does not, as a matter of law, establish a conspiracy warranting conviction under the first count.

A more detailed analysis on the evidence will be subsequently made under the various legal points hereinafter discussed.

SPECIFICATIONS OF ERRORS.

1. That the evidence is insufficient as a matter of law to sustain any count in the indictment;

2. That the Court erred in denying the motion for a new trial;

3. By reason of said errors and other manifest errors appearing in the record designated herein the judgment of conviction should be set aside.

Of these errors the first will be urged in this appeal with respect to the first, or conspiracy count only. The second error will not be urged on this appeal.

SUMMARY OF ARGUMENT.

To convict of a conspiracy involving only two conspirators, both must have the requisite knowledge, intent, and motive. Failure of one of the conspirators to meet the essential requirements necessarily requires the acquittal of the other alleged conspirator irrespective to that other's knowledge, intent, or motive.

To convict of a conspiracy, the object of which is to specifically violate 18 U.S.C. § 80, knowledge of both conspirators of the existence of that law is essential. The Government has failed to prove that either or both of the alleged conspirators knew of the law at the time of the alleged violation. This negatives the existence of a conspiracy for that purpose.

In order to have a violation of 18 U.S.C. § 80, it is necessary not only that a false statement be filed with the Government or a department or agency thereof, but it is also requisite that the person filing the statement knew that it was false. Merely filing a false statement does not constitute a violation of that section. The evidence does not show that Abreu knew the statement filed by him was false. No inference can be drawn from the evidence that such was the fact.

In order to have a conspiracy, the object of which is to perform acts which are in violation of 18 U.S.C. § 80, it is necessary that the conspirators conspire to file a false statement knowing that the statement to be filed is false. The failure of the Government to prove that Abreu knew that the statement to be filed and filed by him for the acquisition of the jeep was a false statement negatives the existence of a conspiracy for that purpose. No inference can be drawn from the evidence that Abreu knew at any time that the object of the agreement was the acquisition of a jeep by virtue of the filing by him of a false statement.

In order to have a conspiracy, it is necessary that the Government prove that the conspirators had a corrupt motive and had the intent to commit a crime. The Government has failed to prove that Abreu had such motive or intent. Consequently, the evidence is insufficient as a matter of law to sustain the first count of the indictment.

I.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE FIRST COUNT IN THE INDICTMENT.

The indictment under this count charges that the defendant and Oliver Abreu knowingly and wilfully conspired to violate 18 U.S.C. § 80 by making and presenting to the Territorial Surplus Property Office a false and fraudulent application, statement, and certificate that a designated jeep would be purchased by Abreu, a veteran, for his own and sole use in his

business, whereas, it was the intention of the conspirators to purchase the jeep for the use of the defendant, a non-veteran, who was not entitled to the benefit of the veterans' priority privilege. Certain overt acts are alleged including a meeting between the conspirators, a presentation of the application for the purchase of the jeep, and payment therefor. This count is laid under 18 U.S.C. § 88.

The pertinent provisions of § 80 of Title 18, read:

“* * * whoever, * * * for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, * * * shall knowingly and willfully * * * make or cause to be made any false or fraudulent statements or representations, or make or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.”

The pertinent provisions of § 88 of Title 18 (Criminal Code, § 37) read:

“If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.”

To have a conspiracy within the provisions of § 88 as well as at common law, there must be at least two

conspirators. One person cannot be a conspirator by himself. A showing, therefore, that one of the parties was not a conspirator will necessitate a holding that the other party be acquitted of that charge. Likewise, a failure by the Government to prove that both were conspirators is a failure to prove that either were conspirators.

Morrison v. California, 291 U.S. 82 (1933);
Gebradi v. United States, 287 U.S. 112 (1932);
Turinetti v. United States, 2 F. (2d) 15 (8th
 Cir. 1924);
Commonwealth v. Benesch, 290 Mass. 125, 194
 N.E. 905 (1935).

As was stated in the *Morrison* case, 291 U.S. 82:

“It is impossible in the nature of things for a man to conspire with himself. * * * In California as elsewhere conspiracy imports a corrupt agreement between not less than two with guilty knowledge on the part of each.” (p. 92.)

“* * * Doi was not a conspirator, however guilty his own state of mind, unless Morrison had shared in the guilty knowledge and design. * * * The joinder was something to be proved, for it was of the essence of the crime. * * * The conviction failing as to the one defendant must fail as to the other.” (p. 93.)

A. Lack by Abreu of knowledge requisite for violation of 18 U.S.C. § 80.

That a specific intent is necessary for a criminal conspiracy is basic. The very essence of the crime is

the combination of two or more minds to further their specific criminal intent or purpose.

Marino v. United States, 91 F. (2d) 691 (9th Cir. 1937) ;

Fowler v. United States, 273 Fed. 15 (9th Cir. 1921) ;

Elkin v. People, 28 N.Y. 177 (1863) ;

Albert J. Harno, *Intent in Criminal Conspiracy*, 80 U. of Pa. L. Rev. 624.

In the *Fowler* case, *supra*, 273 Fed. 15 at 19, this court stated that the agreement requisite for a criminal conspiracy exists "if there be a concert of action, all of the parties working together understandingly, with a single design for the accomplishment of a common purpose". This language was subsequently cited with approval by this court in the *Marino* case, which also adopted the definition of conspiracy as "a partnership in criminal purposes. * * * The gist of the crime * * * is the * * * combination of minds". (p. 691.)

In the *Elkin* case, *supra*, 28 N.Y. 177 at 179, it is stated:

"* * * The gravamen of the offense, that if two or more persons shall conspire falsely and maliciously, to procure another to be charged or arrested for any offense, they shall be deemed guilty of a misdemeanor, clearly imports that the false or malicious intent or state of mind applied to the act of making the charge or causing the arrest. This state of mind does not refer to the act of conspiring, but to the fruits of the conspiracy."

The principle has been tersely stated by Mr. Justice Jackson in his concurring opinion in the case of *Krulewitch v. United States*, 336 U.S. 440 (1948) at 448 in the following language:

“The modern crime of conspiracy * * * is always ‘predominantly mental in composition’ because it consists primarily of the meeting of minds and an intent.”

That it is necessary to allege in the indictment and to prove the evil intent necessary to constitute the act a crime, where the intent is an essential part of the crime, has long been an established principle of criminal law.

Chitty on Criminal Law, 3rd Am. Ed. (1836),
§ 233;

Bishop's New Criminal Procedure (1895),
§ 522;

Clark & Marshall on Crimes, 4th Ed. (1940),
§ 49.

As to the application of this principle in conspiracy cases, see *Pettibone v. United States*, 148 U.S. 197 (1892); *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111.

The specific intent set forth in the first count of the indictment is contained in the allegation that the conspirators “* * * did knowingly, wilfully, unlawfully and feloniously conspire, combine, confederate and agree together and with each other to violate Section 80, Title 18, United States Code, * * *” by making and filing a false statement in connection with the purchase of a jeep (R. 2-4).

This specific intent of violating Section 80, Title 18 of the United States Code said to be the object of the conspiracy was not proved. There is no proof that either of the alleged conspirators knew of the existence of the law, the violation of which it is contended was the specific object of their conspiracy. Even if the Government could be aided by any presumption that the parties knew the law, such presumption would not stand in face of rebutting evidence. *Blumenthal v. United States*, 88 F. (2d) 522, 530 (8th Cir. 1937). The case in chief of the Government clearly establishes that Abreu did not realize that he was breaking any law, for he so testified (R. 46).

The intent necessary for the crime charged not having been proved, there was no conspiracy as charged.

Salas v. United States, 234 Fed. 842 (2nd Cir. 1916) ;

Buchanan v. United States, 233 Fed. 257 (8th Cir. 1916).

The defendant should, therefore, have been acquitted on the conspiracy count.

However, in the event it should be held that there is no fatal variance between the indictment charge that the conspirators intended to specifically violate Section 80 of Title 18 and the proof that they did not intend to violate that section but intended at most to do certain acts which might, under certain circumstances, be violative of that section, then consideration

must be given to the question as to whether persons can be held guilty as conspirators when they conspire to do acts which are violative of a statute, the conspirators being unaware of that fact.

As has been previously pointed out, a criminal intent is necessary for conspiracy. The nature of the crime of conspiracy is such that a fraudulent or criminal intent or a corrupt motive is essential. It is not the doing of any act that constitutes the crime, but rather it is the joinder together of criminal intentions that constitutes the crime.

Whether it is possible to have the necessary criminal intent or corrupt motive without a knowledge of the fact that the unlawful object of the conspiracy is actually unlawful is a question that has been considered some nine times by various courts in the United States. Unlike other fields of the law where everyone is presumed to know the law, it is distinctly questionable whether such presumption is of any validity in the instance where the object of the conspiracy is to do an unlawful act. Without knowledge that the act is unlawful, it is submitted there cannot be the necessary criminal intent or corrupt motive.

This problem was first raised in the United States in the case of *People v. Powell*, 63 N.Y. 88 (1875). The trial court instructed that all that was required to be proved was that the defendants agreed to do an act, which act was violative of a New York statute. The court further charged that ignorance of the law or an absence of intent to violate it was no defense.

On appeal the judgment was reversed, the court stating:

“* * * The agreement must have been entered into with an evil purpose, as distinguished from a purpose simply to do the act prohibited in ignorance of the prohibition.” (p. 92.)

Thus, the first case found to have raised the point in American jurisprudence takes the position that ignorance of the law nullifies the requisite intention or the corrupt motive that must inspire conspirators.

The same approach was used subsequently in New Jersey in the case of *Wood v. State*, 47 N.J.L. 461, 1 Atl. 509 (1885), where it was held that a conspiracy indictment was fatally defective in that it was not alleged that the defendants knew the act which was the object of the conspiracy was an unlawful act, and consequently there was an absence of a charge that there was a corrupt purpose in entering into the conspiracy.

The question was raised again in New York in the case of *People v. Flack*, 125 N.Y. 324, 26 N.E. 267 (1891). There the trial court charged that the defendants' ignorance of the meaning of the conspiracy statute could not be a shield to them if it was found that the acts which were violative of the statute were, in fact, committed. The Court of Appeals, however, held that such instructions were erroneous, stating:

“* * * The actual criminal or wrongful purpose must accompany the agreement, and, if that is absent, the crime of conspiracy has not been committed.” (26 N.E. 270.)

“* * * The character of the acts done, the design with which they were done, and whether fraudulent or not, were questions for the jury.” (26 N.E. 271.)

Subsequently the same problem was raised in the case of *Commonwealth v. Gormley*, 77 Pa. Sup. Ct. 298 (1921). In that case, the trial court rejected evidence tending to show the defendants' bona fide belief that their act was lawful. This was held to be error on appeal, the Appellate Court taking the position that a defendant charged with conspiracy may introduce evidence to show that he had no intention to violate the law, and consequently that there was no corrupt motive inspiring him to do the act.

This problem has been presented to three circuit courts with varying results. In *Chadwick v. United States*, 141 Fed. 225 (6th Cir. 1905), the doctrine of the previous cases was repudiated without mention of the cases themselves. The court states:

“* * * Knowledge that the act which it was the object of the conspiracy to do would be in violation of the law is imputed and need not be proven. Neither do we understand that in courts of the United States the fact that the object of the conspiracy was to do an act which is only mala prohibita requires evidence of knowledge of the unlawfulness of the act purposed by the conspirators. The conspiracy itself is one created by statute and is made out by evidence that its object was to perpetrate some offense against the United States. * * * knowledge of the statute forbidding a

certification in excess of a deposit is imputed. An unlawful or wrongful intent may be implied from the intentional doing of an unlawful act." (p. 243.)

This case was subsequently cited with approval in *Hamburg-American Steam Packet Co. v. United States*, 250 Fed. 747 (2nd Cir. 1918). However, the Second Circuit in its decision referred to the *Flack* and *Powell* cases (pp. 758, 759) and distinguished the latter on the ground that the act of the defendant, which was the object of the conspiracy in the case before it, was not an innocent act but was dishonest and fraudulent. The approach of this court appears to be that where the act which is the object of the conspiracy is obviously unlawful, it is immaterial whether the defendant knows that the act is violative of the law. Certiorari was denied. 246 U.S. 622, 38 S. Ct. 333, 62 L. Ed. 927. For a more recent expression of the position of the Second Circuit, see *United States v. Mack*, 112 F. (2d) 290 (2nd Cir. 1940); *United States v. Ausmeier*, 152 F. (2d) 349 (2nd Cir. 1945).

In *Landen v. United States*, 299 Fed. 75 (6th Cir. 1924), the Sixth Circuit reversed a conviction of conspiracy on the ground that there was error in the ruling by the trial court that reasonable belief in the legality of the act constituted no defense. In the decision the court reaffirms the principle of the *Powell* case and limits the application of the *Chadwick* and *Hamburg-American* cases to situations where the act to be done is inherently wrongful.

In Massachusetts the problem was raised in the case of *Commonwealth v. Benesch*, 290 Mass. 125, 134, 135, 194 N.E. 905, 910 (1935), where the Supreme Judicial Court stated:

“To constitute the criminal intent necessary to establish a conspiracy there must be both knowledge of the existence of the law and knowledge of its actual or intended violation.”

The final case found on the subject, *Cruz v. United States*, 106 F. (2d) 828 (10th Cir. 1939), was decided by the Tenth Circuit. In that case it was held that it is not necessary to establish knowledge on the part of the defendant of the existence of the law defining the offenses even where it is *mala prohibita*. Where a corrupt motive is established, such knowledge is imputed. This case is a throw-back to the repudiated doctrine of the *Chadwick* case. This represents the law, if it is the law, only in the Tenth Circuit, and, it is submitted is not solidly grounded, the cases cited for its holding not standing for the principle claimed (Footnote p. 830).

No case has been found either in this Circuit or in the Supreme Court dealing specifically with this point.

It is therefore to be seen that with the exception of the *Chadwick*, the *Hamburg-American Company* and the *Cruz* cases, the decisions in the United States have consistently held that in order to have the requisite intent and corrupt motive, it is essential that the conspirators know that the act they are planning to commit is violative of the law. The absence of such knowl-

edge on their part negatives the existence of a conspiracy.

The *Hamburg-American* case goes along with this principle in instances where the act contemplated is not obviously unlawful. Where of its nature it is inherently violative of the law and obviously so, the belief of a conspirator that it is not unlawful would, according to the court, be completely unreasonable, and the Sixth Circuit similarly limits the application of the *Chadwick* case.

It may thus be concluded that one of two principles is applicable in conspiracy cases. Either ignorance that the object of the conspiracy is violative of law will negative the requisite criminal intent or corrupt motive in all cases, or it will do so only in cases where the object of the conspiracy is so obviously illegal that no reasonable person could suppose the act was lawful.

It makes no difference, however, which principle is applied in the instant case. An agreement to buy a jeep for the use of someone other than the purchaser is not *malum in se*. A purchase by a veteran of a surplus jeep from the Government for the use of other than a veteran is *mala prohibita* only. The act of purchasing the jeep is not so obviously illegal that no reasonable man could suppose the act was lawful.

If the defendants or either of them did not know the act contemplated was violative of the law, then there was no conspiracy.

An analysis of the record clearly shows that no evidence was adduced to prove that either of the alleged

conspirators knew of the law that their contemplated acts might violate. The record affirmatively shows that Abreu did not know that the contemplated acts were violative of the law (R. 46).

It is submitted that in this posture of the case, Abreu's testimony having been adduced on direct examination by the Government and not being impunged in any way by the prosecution, one of the essential elements of a conspiracy is lacking. As a consequence, irrespective as to the defendant's knowledge, belief, intention, or corrupt motive, there was no conspiracy and, therefore, the defendant should be acquitted on that count.

B. Lack of requisite knowledge by Abreu that the documents to be filed were false and fraudulent.

Section 80 of Title 18 of the United States Code, the violation of which it is alleged the conspirators conspired to accomplish, requires that the person violating the statute shall have the purpose and intent of cheating and swindling or defrauding the Government of the United States and shall file a false and fraudulent statement knowing that it is fraudulent or fictitious.

Under this action, the knowing falsity of the statement filed is the very essence of the crime.

United States v. Uram, 148 F. (2d) 187 (2nd Cir. 1945);

Bridgeman v. United States, 140 Fed. 577 (9th Cir. 1905);

Christensen v. United States, 90 F. (2d) 152 (7th Cir. 1937);

United States v. Buckley, 49 F. Supp. 993 (D.C.D.C. 1943);

United States v. Long, 14 F. Supp. 29 (D.C. Mass. 1936);

United States v. Reichert, 32 Fed. 142 (C.C.D. Calif. 1887);

United States v. Bittinger, 29 Fed. Cas. No. 14,599 at 1150 (D.C. Mo. 1875).

The Second Circuit in the *Uram* case stated this principle in the following language:

“* * * It is the knowing falsity of the statement which is the material part of the statutory crime, not the vehicle of its perpetration.” (148 F. (2d) 187, 190.)

The construction of this section to the effect that the statute means what it says, and the requirement that the person filing the false statement must know that it is false, is not peculiar to this statute. Other Federal statutes containing the same requirements as to knowledge have been similarly interpreted. *Cliquot v. United States* (Cliquot's Champagne), 3 Wall. 114, 18 L. Ed. 116 (1866).

A statutory crime strikingly similar in language to one had under Section 80 was construed by this court in the case of *C.I.T. Corporation v. United States*, 150 F. (2d) 85 at 93:

“The crime charged against Thomas, * * * was conspiracy to ‘cause to be made’ an instrument ‘knowing the same to be false’ and ‘for the purpose of influencing * * * the action of said Administration.’ Knowledge of falsity and a pur-

pose, that is, intent to use the falsehood for such influence, is the essence of the crime. It is not sufficient to prove Thomas guilty to show that he signed a document with an untruthful statement which might tend to influence the Administration. The burden on the government is to prove his knowledge of its falsity and his criminal intent so to influence the Administrator's acceptance of the borrower's note. This proof may be by circumstantial evidence, but such facts must be proved."

The Second Circuit has made a similar construction in a case involving a conspiracy with intent to violate the Alien Registration Law. In *United States v. Ausmeier*, 152 F. (2d) 349 at 356, the following language is found:

"But the making of such false statements was not enough to justify a verdict of guilt. Pursuant to 18 U.S.C.A. § 88, each of the defendants was charged with and convicted of conspiring to defraud the United States by the filing of statements in violation of the Alien Registration Act, 8 U.S.C.A. § 452 et seq. Section 457 (c) of that Act imposes a penalty on an alien who 'files an application for registration containing *statements known by him to be false* * * *.' As the substantive crime thus involved both (a) falsity and (b) knowledge of the falsity, the defendants were obviously entitled to have the judge charge, in the most unmistakable language, that no defendant here could be found guilty unless he was a party to an agreement, plan, or combination, to file an application containing statements known to him to be false. The existence of a common undertak-

ing, in which a defendant joined, merely to file statements which were false, but not known to him to be false, could not support his conviction."

The necessity of knowledge as an essential element of the crime of violating the National Housing Act and the Alien Registration Act is similar to that required for violation of Section 80. It is submitted that the principles enunciated in the *C.I.T. Corporation* case and in the *Ausmeier* case are determinative of the problem involved in this case, and that the former case is the controlling precedent to be followed by this court in the instant situation.

Further, since the indictment charges the conspiracy to have continued only during the period November 12 to November 30, 1946 (R. 2), this knowledge must be proved to have been had during this period. How has the Government met this burden of proof?

There is no proof that Abreu, an automobile mechanic, read any of the statements filed with the Territorial Surplus Property Office. There is no evidence that any of those statements were read to him or their contents explained to him. There is evidence that the first one (Exh. 1) was filled out by him on September 20, 1946, three weeks prior to the date on which it was charged that the conspiracy commenced. This form was filled out by Abreu with the defendant whom he regarded as his employer (R. 60) showing him how to fill it out because Abreu had had no experience with

such forms (R. 38). The purchase order (Exh. 2), the first statement filed by him during the alleged conspiracy period, was signed by him at the defendant's office at the defendant's request, the form having been furnished to Abreu by the defendant. When signed by Abreu, it was blank (R. 40, 41, 103, 106), and after having been signed, was apparently taken by the defendant and not thereafter seen by Abreu. There is absolutely no evidence that Abreu read it, that it was read to him, or its contents explained to him. Rather, his testimony shows that he followed the defendant's instructions, e.g., "Every time he tells me to go down, I'd go down with him" (R. 58); "What he told me was, sign this, and after that I went down here" (R. 59).

The third document signed by him (Exh. 3) had apparently been prepared for his signature, and he was not required to fill in any blanks but merely to affix his name. Again, there is no evidence that he read the document, that it was read to him, or explained to him.

Consistent, however, with the lack of proof of his having read or understood the document signed by him and consistent with the defendant's position that Abreu did not, in fact, realize that he was signing any false or fraudulent papers is his testimony on direct evidence that he was not concerned about the possible illegality of the transaction until "some time after we got the jeep" (R. 46). It is submitted that the only reasonable interpretation of this statement is that he did not sign a false and fraudulent statement knowing

and understanding it to be such. It is submitted that this is hardly the statement of a man who has with full knowledge and understanding signed an instrument he knows contains false and fraudulent misstatements.

To paraphrase the language of this court in the *C.I.T. Corporation* case:

It isn't sufficient to show that Abreu signed a document with an untruthful statement. The burden on the Government is to prove his knowledge of its falsity and his criminal intent so to cheat and swindle or defraud the Government. This proof may be circumstantial evidence but such facts must be proved.

It is submitted that the facts do not either directly or circumstantially prove the requisite knowledge required by Title 18, United States Code, Section 80. If there is not the requisite knowledge to violate that section, there is not the requisite knowledge to be a conspirator to violate that section or to be a conspirator to do acts which are violative of that section.

CONCLUSION.

It is, therefore, respectfully submitted that:

1. The evidence presented to the trial court was insufficient as a matter of law to sustain the first count of the indictment charging that the defendant and Abreu had knowingly and wilfully conspired to violate 18 U.S.C. § 80 in that the evidence failed to establish

that both conspirators knew of the existence of this statute.

2. The evidence presented to the trial court was insufficient as a matter of law to sustain the first count of the indictment charging that the defendant and Abreu had knowingly and wilfully conspired to present to the Territorial Surplus Property Office a false and fraudulent application in that there was a failure of proof that both of the alleged conspirators knew that any statement filed was, in fact, false or fraudulent.

3. The evidence presented to the trial court was insufficient as a matter of law to sustain the first count of the indictment charging that the defendant and Abreu had knowingly and wilfully conspired to violate 18 U.S.C. § 80, the evidence failing to establish that both of the alleged conspirators knew that any object of the alleged conspiracy was violative of Federal law.

Wherefore, the appellant prays that the conviction of the lower court for violation of the first count of the indictment be reversed and that the appellant be acquitted thereof.

Dated, Honolulu, T. H., this 26th day of April, 1950.

SMITH, WILD, BEEBE & CADES,
By J. EDWARD COLLINS,
Attorneys for Appellant.

No. 12,460

IN THE
United States Court of Appeals
For the Ninth Circuit

ROBERT NELSON LANTIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLEE.

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FILED

MAY 20 1950

AUL P. O'BRIEN,

CLERK

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No. 12,460

IN THE
United States Court of Appeals
For the Ninth Circuit

ROBERT NELSON LANTIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the District of Hawaii.

BRIEF FOR APPELLEE.

JURISDICTION.

Section 3231 of Title 18, United States Code, confers jurisdiction upon the Court below; and Sections 1291 and 1294 of Title 28, United States Code, grant appellate jurisdiction to this Honorable Court.

STATEMENT OF THE CASE.

On March 23, 1949, the Grand Jury for the United States District Court for the District of Hawaii returned an indictment in two counts, charging Robert Nelson Lantis, the defendant and appellant herein,

who is a non-veteran, in Count I with having conspired during November 1946 with one Oliver Abreu, a veteran, to violate "Section 80, Title 18, United States Code, by making and causing to be made, presenting and causing to be presented, to and in a matter within the jurisdiction of the Territorial Surplus Property Office, a branch office of a department and agency of the United States of America, a false and fraudulent application, statement, certificate, and representation" in connection with the unlawful purchase of a surplus vehicle, a jeep. It is alleged in the indictment that the said application and statement was false in that Oliver Abreu represented he was purchasing the jeep for his own use and not for resale, whereas he was in fact purchasing it for the sole use and benefit of the defendant. In Count II of the indictment, the defendant is charged with having caused the said Oliver Abreu to commit one of the substantive offenses, namely the filing of the said false statement with knowledge that the statement was false (R. 2-5.) Oliver Abreu testified repeatedly that he purchased the vehicle at the defendant's request, that he purchased it for the defendant and not for himself, and that the defendant did not lend him the money with which the purchase was made (R. 37, 38, 42, 46, 57-61, 69).

With reference to the testimony of the defendant, the attention of this Court is called to the fact that while he testified the subject vehicle had a value of approximately \$150.00 (R. 83), he was unable to remember to whom he had sold it or for how much

(R. 92-93). It must be borne in mind that the defendant had a U-Drive business and that he used jeeps in this business (R. 43). Furthermore, the defendant testified that a certain Veteran's Purchase Order, Plaintiff's Exhibit No. 2, which was used in connection with the purchase of the jeep, had been "all filled out" and brought to the defendant by Abreu (R. 81), while Abreu and another witness, Anthony W. Cambra, testified the defendant had supplied that form and that it was not filled out (R. 41, 108).

The appellee does not controvert the remainder of the statement of the case set forth in the brief for appellant which limits the issue in the appeal to the question of whether the evidence is sufficient as a matter of law to sustain either count in the indictment.

SUMMARY OF ARGUMENT.

There was ample evidence adduced at the trial of this case before the United States District Court for the District of Hawaii to sustain the defendant's conviction as to each count of the indictment.

The appellee does not disagree with the appellant's statement (Brief for Appellant, p. 4) that to convict a defendant of a conspiracy involving only two conspirators, both must have the requisite knowledge and intent, but it is not necessary that the conspirators should have knowledge of the specific statute defining the substantive offense but only that they should have knowledge of the object of the con-

spiracy, in this case the submission of a false statement for the purchase of a surplus jeep and the unlawful purchase of that jeep.

The appellee concurs with the appellant's statement that to have a violation of Section 80, Title 18, United States Code, it is not only necessary that a false statement be filed with the Government or a department or agency thereof, but it is also essential that the person filing the statement knew that it was false. It is submitted that there was more than ample proof upon which the trial court necessarily found that both Abreu and the defendant knew the statements filed by Abreu were false.

To have a conspiracy, a corrupt motive or intent is not required if there is an intent on the part of the conspirators to do or to have done an act or acts which are a statutory crime or in violation of the law, however, there was adequate evidence of corrupt intent on the part of both Abreu and the defendant adduced at the trial of this case.

ARGUMENT.

I. THE EVIDENCE ADDUCED AT THE TRIAL OF THIS CASE SUSTAINS THE DEFENDANT'S CONVICTION ON BOTH COUNTS OF THE INDICTMENT.

A conspiracy has been defined by the courts many times as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means. *Pettibone*

v. United States, 148 U.S. 197, 203 (1893); *Marino v. United States*, 91 F. (2d) 691, 693 (1937, C.C.A. 9th), certiorari denied, 302 U.S. 764. A formal agreement is not necessary and it is sufficient that the minds of the parties met understandingly so as to bring about an independent and deliberate agreement, and even a mutual implied understanding is sufficient. *Marx v. United States*, 86 F. (2d) 245, 250 (1936, C.C.A. 8th); *Hyde v. United States*, 225 U.S. 347, 376 (1912). Act of March 4, 1909, c. 324, § 37, 35 Stat. 1096 (18 U.S.C. 88), which makes a conspiracy to commit an offense against the United States a penal violation, includes conspiracies to violate regulations authorized by law. *United States v. Von Clemm*, 136 F. (2d) 968 (1943, C.C.A. 2nd), certiorari denied, 320 U.S. 769; *United States v. Kertess*, 139 F. (2d) 923 (1944, C.C.A. 2nd), certiorari denied, 321 U.S. 795. The statute adds to the common law crime of conspiracy in so far as it requires that one or more of the parties must do an act to effect the object of the conspiracy which act must be both averred and proven. *Hyde v. United States*, supra, at 359; *Bannon v. United States*, 156 U.S. 464, 468 (1895). The overt act done to effect the object of the conspiracy may be that of only a single one of the conspirators and it need not appear that the others expressly join in it nor need it be a criminal act of itself. *Braverman v. United States*, 317 U.S. 49, 53 (1942); *United States v. Rabinowich*, 238 U.S. 78, 86 (1915). The exact date of formation of the conspiracy does not have to be set out, and if alleged, need not be proven as laid, but it is sufficient if

shown to have existed prior to the commission of the overt act and to continue to exist at that time. *Bradford v. United States*, 152 Fed. 617, 619 (1907, C.C.A. 5th), certiorari denied, 206 U.S. 563; *Pearlman v. United States*, 20 F. (2d) 113, 114 (1927, C.C.A. 9th), certiorari denied, 276 U.S. 549.

Intent is a necessary element of the crime of conspiracy. *Frohwerk v. United States*, 249 U.S. 204, 209 (1919); *Wong Tai v. United States*, 273 U.S. 77, 81 (1927); *Mazurosky v. United States*, 100 F. (2d) 958, 962 (1939, C.C.A. 9th). This must be an intent to commit every element of the substantive offense which is the object of the conspiracy. *United States v. Mack*, 112 F. (2d) 290, 292 (1940, C.C.A. 2nd); *Chadwick v. United States*, 141 Fed. 225, 243 (1905, C.C.A. 6th).

The evidence adduced at the trial of this case amply proves the essential elements of a violation of Act of March 4, 1909, c. 324, § 37, 35 Stat. 1096 (18 U.S.C. 88), outlined above. In Count I of the indictment, the commission of two offenses against the laws of the United States is set out as the object of the conspiracy: first, the making of a false statement in violation of Section 80, Title 18, United States Code; and second, the purchase under veteran's priority of a surplus vehicle for the defendant, which was in violation of Section 1625, Title 50, Appendix, United States Code, and the regulations promulgated thereunder. Proof of conspiracy to do acts violative of one statute is sufficient. *Kepl v. United States*, 299 Fed. 590, 591 (1924, C.C.A. 9th), certiorari denied, 266 U.S. 617; *United States v. Smith*, 112 F. (2d) 83, 86

(1940, C.C.A. 2nd). Abreu testified to the agreement between himself and the defendant pursuant to which Abreu was to make a purchase of a surplus vehicle for the defendant (R. 37-38).

There is also evidence that Abreu knew the statements which were submitted to the Territorial Surplus Property Office were false, and that the defendant, who assisted in their preparation, knew they were false, and that they agreed and planned with each other to submit such false statements which were submitted by them, in concert. Though knowledge by the defendant that the purchase of the surplus jeep for him by Abreu under veteran's priority was unlawful need not have been proven, there is evidence in the record that the defendant had such knowledge, for why else would he have asked Abreu to make the purchase if he could have made it lawfully himself? Although it must be proven that the defendant knew the object of the conspiracy, namely, the making of false statements and/or the purchase under veteran's priority of a surplus vehicle by Abreu for him (*Marino v. United States, supra*, at 696), knowledge that such object is unlawful need not be proven but will be presumed *Chadwick v. United States, supra*, at 243; *Cruz v. United States*, 106 F. (2d) 828, 830 (1939, C.C.A. 10th).

Each of the overt acts alleged in the indictment were proven. Abreu testified to the first alleged overt act (R. 40-41, U.S. Exhibit No. 2), as did Cambra (R. 101-106). Abreu testified to the second alleged overt act (R. 40-41, U.S. Exhibit No. 2) and also to

the third alleged overt act (R. 43-44-45-59, U.S. Exhibit No. 3).

The record is replete with evidence that in effecting the object of the conspiracy, Abreu did file false statements with the Territorial Surplus Property Office. Pursuant to his agreement with the defendant, Abreu filed an application for surplus property, U.S. Exhibit No. 1, in which he stated that such property as he might be permitted to purchase under that application would be purchased for his "personal use". On or about November 18, 1946, he signed a certificate that he was not "acting as an agent for others" and that he was not purchasing the surplus jeep "for resale" (U.S. Exhibit No. 3), whereas, as he and the defendant then and there well knew, he was in fact purchasing this jeep for the defendant (R. 42-45-46-57-61, 69).

It is respectfully submitted that the evidence was sufficient to sustain the defendant's conviction on both counts of the indictment.

II. NEITHER KNOWLEDGE OF THE STATUTE DEFINING THE SUBSTANTIVE UNLAWFUL ACTS NOR KNOWLEDGE THAT THE OBJECT OF THE CONSPIRACY IS UNLAWFUL IS AN ESSENTIAL ELEMENT OF A CONSPIRACY.

In urging that the evidence is insufficient as a matter of law to sustain the first count in the indictment, the appellant argues that "there is no proof that either of the alleged conspirators knew of the existence of" Section 80, Title 18, United States Code (Appellant's Brief, p. 10). In support of this, they

recite Abreu's statement that he "didn't know" the purchase of the jeep might be in violation of the law (R. 46). In the instant case, it was not required that the Government prove that one or both of the conspirators knew of the existence of the statute defining the substantive offense, namely, Act of April 4, 1938, c. 69, 52 Stat. 197 (18 U.S.C. 80), or that the conspirators knew that the filing of the false statements by Abreu was unlawful, or that the defendant and Abreu knew the purchase of the surplus jeep under veteran's priority for the defendant was in violation of the law, but only that the conspirators intended to file such false statements knowing that they were false and intended to make such purchase for the defendant. *United States v. Mack, supra; Chadwick v. United States, supra; United States v. Keegan*, 141 F. (2d) 248, 254 (1944, C.C.A. 2nd), rev'd. on other grounds, 325 U.S. 478.

Ordinarily, knowledge that the object of a conspiracy is unlawful or fraudulent will be presumed (*Chadwick v. United States, supra*, at 243), and "even where the substantive offense is merely *mala prohibita*" if "a corrupt motive is established such knowledge is imputed." *Cruz v. United States, supra*; 15 C.J.S. 1066. In this connection, some of the Courts have drawn a distinction between a substantive offense which is *mala in se* and one which is *mala prohibita*. *Landen v. United States*, 299 F. (2d) 75, 78, 79 (1924, C.C.A. 6th); *Commonwealth v. Benesch*, 290 Mass. 125 (1935); *People v. Powell*, 63 N.Y. 88 (1875). It is to be noted that in most of the cases cited by appellant in support of his argument that the Government

is required to prove either a knowledge of the violated statute or a knowledge that the contemplated acts were unlawful or corrupt on the part of the conspirators, the objects of the alleged conspiracies were merely *mala prohibita*, or no corrupt motive was charged in the indictment. The prevailing rule of law followed by the courts of the United States seems to be that the Government need not prove knowledge on the part of a conspirator that the object of the conspiracy is unlawful. *Hamburg-American Steam Packet Co. v. United States*, 250 Fed. 747 (1918, C.C.A. 2nd); *United States v. Mack*, *supra*, at 292; *Blumenthal v. United States*, 88 F. (2d) 522, 540 (1937, C.C.A. 8th); *Cruz v. United States*, *supra*; *United States v. Keegan*, *supra*, at 254. This principle adopted by these courts is in line with the doctrine on which our entire system of criminal jurisprudence rests, that ignorance of penal laws is no defense to indictment for their violation. Wharton's Criminal Law, Vol. I, Sec. 102.

In the instant case, the purchase of the surplus jeep under veteran's priority for the defendant was *mala prohibita* and under the *Cruz* and *Keegan* cases, knowledge that it was unlawful could be presumed, but there is evidence in the record that the defendant knew this or he would not have searched out a veteran and asked the veteran to make the purchase for him. On the other hand, the making of the false statement, which constituted an integral part of the unlawful purchase, was corrupt in itself and *mala in se*, and knowledge that it was in violation of the law was properly imputed. It is also to be noted that the fraudulent or corrupt nature of the plan or con-

spiracy may be inferred from a series of isolated acts. *Deaver v. United States*, 155 F. (2d) 740, 744 (1946, App. D.C.), certiorari denied, 329 U.S. 766.

In the case of *United States v. Keegan, supra*, the appellants had been charged with conspiring to counsel divers persons to evade, resist and refuse service in the armed forces of the United States in violation of Section 11 of the Selective Training and Service Act of 1940. In their defense, it had been argued that they were merely endeavoring to bring a test case to determine the constitutionality of another section of the Selective Training and Service Act of 1940, that they lacked a corrupt motive, and consequently were not guilty of violating the conspiracy statute. The trial judge instructed the jury that this was no defense, stating that "if there was a conspiracy amongst these defendants or any of them having as its object the violation of the Selective Service law, knowingly, the reason of such violation is immaterial to you in your consideration of the question of their guilt or innocence." This instruction was cited by the appellants as error. Judge Augustus N. Hand, speaking for the Second Circuit held "that to establish violation of the statute, nothing more has to be proven than that the parties had in contemplation all the elements of the crime they are charged with conspiracy to commit."

The Supreme Court, in a 5 to 4 decision, reversed the judgment in the *Keegan* case on *other grounds* but Chief Justice Stone in his dissenting opinion states as follows (*Keegan v. United States*, 325 U.S. 478, 504 (1945)):

The doctrine of *People v. Powell*, 63 N.Y. 88, on which petitioners rely, that a criminal conspiracy to do an act "innocent in itself" not known by the conspirators to be prohibited must be actuated by some corrupt motive other than the intention to do the act which is prohibited and which is the object of the conspiracy, has never been accepted by this Court. To establish violation of § 11 nothing more need be proved than that respondents had in contemplation all the elements of the offense which they conspired to commit. *United States v. Mack*, 112 F.2d 290, 292; cf. *Hamburg-American Steam Packet Co. v. United States*, 141 F. 225, 243. There is no contention that petitioners did not know that the Selective Service Act required those subject to it to do military service. And *People v. Powell*, *supra*, was careful to point out that where the conspiracy is to do an act which is not "innocent in itself" the offense is "complete when the act is intentionally done," irrespective of any actual intention to violate the law. Here the act prohibited was hardly "innocent in itself." The facts found by the jury under instructions of the court constitute plain violation of § 11, and the jury's verdict is supported by the evidence.

III. THERE WAS ADEQUATE EVIDENCE THAT BOTH THE DEFENDANT AND ABREU KNEW THE STATEMENTS FILED BY AND FOR ABREU WITH THE TERRITORIAL SURPLUS PROPERTY OFFICE WERE FALSE.

The statements filed by Abreu (U.S. Exhibit Nos. 1, 2 and 3) with the assistance of the defendant and with full knowledge of their contents on his part were false assertions of existing intent and promise and

constitute violations of Section 80, Title 18, United States Code. *United States v. Uram*, 148 F. (2d) 187, 189 (1945, C.C.A. 2nd). The testimony of Abreu reveals beyond a reasonable doubt that he, as well as the defendant, knew those statements and representations to be false (R. 42, 44, 45, 46, 57-61, 69). There was adequate basis for the trial court's finding that Abreu had read and knew the contents of both United States Exhibits Nos. 1 and 3 prior to their filing, and that the defendant knew the contents of United States Exhibits Nos. 1, 2 and 3 prior to their filing.

CONCLUSION.

It is respectfully submitted that the trial court did not err in any matter brought before it in the trial of this case, and that the judgment of that court should be affirmed.

Dated, Honolulu, T. H., this 19th day of June, 1950.

Respectfully submitted,

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District of Hawaii,

HOWARD K. HODDICK,

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Attorneys for Appellee.

No. 12,460

IN THE

United States Court of Appeals
For the Ninth Circuit

ROBERT NELSON LANTIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court,
Territory of Hawaii.

REPLY BRIEF FOR APPELLANT.

SMITH, WILD, BEEBE & CADES,
J. EDWARD COLLINS,

Bishop Trust Building, Honolulu, T. H.,

Attorneys for Appellant.

FILED

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PAUL P. O'BRIEN,

CLERK

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**United States Court of Appeals
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Appellant,

VS.

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Appeal from the United States District Court,
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REPLY BRIEF FOR APPELLANT.

ARGUMENT.

**I. THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW
TO SUSTAIN THE FIRST COUNT IN THE INDICTMENT.**

It is conceded by the Government that in order to convict one as a conspirator in a conspiracy involving only two persons, it must be proved that both conspirators had the requisite knowledge and intent. Knowledge and intent of one alone is not sufficient (Brief of Appellee, p. 3).

The Government likewise concedes that in order to have a violation of Section 80 of Title 18, United States Code, it is not only necessary that a false statement be filed with the Government or a department or

agency thereof, but it is also essential that the person filing the statement know that it is false (Brief of Appellee, p. 4).

The Government also concedes that a necessary element of the crime of conspiracy is intent to commit every element of the substantive offense which is the object of the conspiracy (Brief of Appellee, p. 5).

It follows consequently that both conspirators must have had the necessary knowledge and intent to commit every element of the substantive offense charged as the object of the conspiracy.

The Government contends that two objects of the conspiracy are charged in the indictment (Brief of Appellee, p. 6). The appellant concedes that the first stated object, to-wit, the violation of Title 18, Section 80, United States Code, is specifically stated in the first count of the indictment (R. 2-4). The Government is in error, however, in its statement that a second object of conspiracy is set out in the first count of the indictment, to-wit, the purchase under Veterans' Priorities of a surplus vehicle for the defendant, which purchase was in violation of Section 1625, Title 50, Appendix, United States Code, and the regulations promulgated thereunder (Brief of Appellee, p. 6).

The Government could have framed its indictment so as to aver a single conspiracy to violate one or more statutes, and proof of conspiracy to violate any one of such statutes would have been sufficient to support conviction. *United States v. Bates*, 141 F. (2d) 436 (7th Cir. 1944), 148 F. (2d) 907 (7th Cir. 1945); *United States v. Mack*, 112 F. (2d) 290, 292 (2nd Cir.

1940). But the Government did not do so. It charged violation of only one statute, Title 18, United States Code, Section 80 (R. 2-4). The judgment was one of conviction for conspiring to cause to be made false statements and certificates upon application to purchase surplus war materials from the Surplus Property Office "as charged" in Count I of the indictment (R. 8-9).

The opening statement of counsel for the Government explained the indictment as charging the defendant "with having conspired with one Oliver Abreu to violate Section 80, Title 18, U. S. Code", and further, "It is a conspiracy to submit a false statement contrary to law" (R. 33-34). Nowhere in the proceedings below is any reference made to Section 1625, Title 50, Appendix, United States Code, or of any regulations promulgated thereunder.

The interjection of this section and of these regulations at this stage in the proceedings is obviously an afterthought of the Government, and does not furnish the basis of either the indictment or judgment of conviction below.

It is from a judgment of conviction for violation of Title 18, Section 80 of the United States Code that this appeal was taken, and it is on the basis of the statutory requirements of that section that this Court must affirm or deny the judgment of the trial court.

Just as it is fundamental that the Government cannot charge one crime and prove another, *Kepl v. United States*, 299 Fed. 590, 591 (9th Cir. 1924); *Moss v. United States*, 132 F. (2d) 875 (6th Cir.

1943), so the Government cannot secure a conviction for conspiracy to violate a specific statute and justify the conviction on appeal by claiming the judgment of conviction can be sustained as a violation of another statute.

II. ABREU'S LACK OF KNOWLEDGE REQUISITE FOR THE VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 80, AND HIS LACK OF KNOWLEDGE THAT DOCUMENTS TO BE FILED WERE FALSE AND FRAUDULENT.

The Government contends that it is not necessary to prove that conspirators knew the object of their machinations were unlawful or fraudulent (Brief of Appellee, p. 9). In support of this statement, five cases are cited. An analysis of the cases shows, however, that in each one of them, the object of the conspiracy was of such a character that, whether known to be violative of a statute or not, it was inherently wrongful and corrupt.

Thus, in the *Hamburg-American Steam Packet* case, 250 Fed. 747 (2nd Cir. 1918), the court found (p. 759) that the act which was the object of the conspiracy "was not innocent, but dishonest and fraudulent" involving "false oaths" and "corrupt conduct". This is hardly the type of case that can be characterized as one in which the conspirators did not know or should not know that the object of their conspiracy was unlawful or fraudulent. In *United States v. Mack*, 112 F. (2d) 290, 292 (2nd Cir. 1940), the court characterizes the case as one abounding in "corrupt motive". In *Blumenthal v. United States*, 88 F. (2d) 522, 530, 531 (8th Cir. 1937), the court found many attend-

ing circumstances pointing to “guilty knowledge” and “criminal intent”. In the *Cruz* case, 106 F. (2d) 828 (10th Cir. 1939), it was stated that the jury could properly find a corrupt motive, an evil design or a wrongful purpose arising out of a scheme “highly reprehensible”, “closely analogous to extortion”, and “shocking to moral sensibilities”. Finally, in *United States v. Keegan*, 141 F. (2d) 248, 254 (2nd Cir. 1944), the defendants knew of the existence of the Selective Training and Service Act that they were charged with having conspired to violate. Indeed, the violations of the act were caused by their desire to test the constitutionality of the legislation. This certainly is not a case standing for the proposition that it is unnecessary for the Government to prove that conspirators knew the object of their conspiracy was unlawful or fraudulent.

It thus appears that in none of the cases cited by the Government in support of the principle advanced by it is the principle enunciated as the decision of the case, but at most is only dicta therein.

As has been pointed out in appellant’s brief, pages 11 to 17, a review of all of the cases indicates that in the absence of proof of knowledge on the part of the conspirators that the act to be performed by them is unlawful or is of such a nature as to be obviously unlawful, it is necessary for the Government to prove as a necessary element of the conspiracy that the conspirators knew that the object of their conspiracy was violative of law.

While the appellant concedes that it is a general principle of criminal law that ignorance of the law is

no defense to indictment for its violation (Brief of Appellee, p. 10), it is urged that this principle has no application in the law of conspiracy. While generally in the law of crimes an intent to commit a crime is not indictable as a crime, a conspiracy, which is a combination of intents to commit a crime, is criminal. This is so, as pointed out by *Harno* in *Intent in Criminal Conspiracy*, 89 U. of Pa. L. Rev. 624, 629, by the nature of the crime:

“* * * The confederation of Roe and Doe through agreement to commit an anti-social act, no doubt, increases their potential dangerousness to the community. But this agreement is so slight an act that, taken by itself, it seems fairly insignificant. It is only as we consider this act in relation to the threat Roe and Doe present to the peace of the community because of the intent they hold that a rationale for the crime can be found. The potential danger to the community is heightened through the agreement, that is, through the act of uniting their intentions, but the full significance of the peril they hold for others can only be understood in terms of their purpose or intent. The intent of each held separately makes each of them potentially dangerous but not a criminal. Their act of agreement, though but a factor of slight added significance, marks them criminals.”

It is submitted that if the act contemplated is not inherently anti-social or cannot be characterized as “corrupt conduct” or cannot be said to be inspired by a “corrupt motive” or the object of “evil design”, then, in order to be criminal, the act contemplated must be in violation of a statute and known by the

conspirators to be such. In other words, they must contemplate morally reprehensible conduct or contemplate conduct known by them to be violative of statutory law.

An agreement to do an act not morally reprehensible or reasonably suspect of being such, and not known to be violative of statutory law, is not the sort of agreement that constitutes a criminal conspiracy.

The Government concedes that the purchase of a surplus jeep by Abreu under Veterans' Priorities was *mala prohibita* (Brief of Appellee, p. 10). Further, it is obvious that such conduct could not be called corrupt in the absence of knowledge of its illegality. Under such circumstances, the *Cruz* and the *Keegan* cases do not apply. Similarly, the *Hamburg-American Steam Packet*, *Mack* and *Blumenthal* cases are equally inapplicable.

The Government concedes that it was required to prove, for a conspiracy to violate Title 18, United States Code, Section 80, that the conspirators intended to file false statements knowing they were false (Brief of Appellee, p. 9). An examination of the record fails to reveal that this burden has been met (Brief of Appellant, pp. 20-22).

CONCLUSION.

For the reasons set out in brief of appellant as well as for the reasons herein contained, it is respectfully submitted that:

1. The evidence presented to the trial court was insufficient as a matter of law to sustain the

first count of the indictment charging that the defendant and Abreu had knowingly and wilfully conspired to violate 18 U.S.C. § 80 in that the evidence failed to establish that both conspirators knew of the existence of this statute.

2. The evidence presented to the trial court was insufficient as a matter of law to sustain the first count of the indictment charging that the defendant and Abreu had knowingly and wilfully conspired to present to the Territorial Surplus Property Office a false and fraudulent application in that there was a failure of proof that both of the alleged conspirators knew that any statement filed was, in fact, false or fraudulent.

3. The evidence presented to the trial court was insufficient as a matter of law to sustain the first count of the indictment charging that the defendant and Abreu had knowingly and wilfully conspired to violate 18 U.S.C. § 80, the evidence failing to establish that both of the alleged conspirators knew that any object of the alleged conspiracy was violative of Federal law.

Wherefore, the appellant prays that the conviction of the lower court for violation of the first count of the indictment be reversed and that the appellant be acquitted thereof.

Dated, Honolulu, T. H.,
July 31, 1950.

SMITH, WILD, BEEBE & CADES,
By J. EDWARD COLLINS,
Attorneys for Appellant.

No. 12461

United States
Court of Appeals
for the Ninth Circuit.

SEARS, ROEBUCK & CO., a Corporation,
Appellant,
vs.

WILLIAM J. McALLISTER, as trustee in the
matter of Keith N. Vallier, whose wife is Irene
Helen Vallier, bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Northern Division.

FILED

APR - 5 1950

PAUL P. O'BRIEN,
CLERK

No. 12461

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for
the Western District of Washington, Northern
Division

In Bankruptcy No. 37894

In the Matter of
KEITH N. VALLIER, whose wife is Irene Helen
Vallier, Bankrupt, #37894.

TRUSTEE'S REPORT OF EXEMPT
PROPERTY

To Van C. Griffin, Referee in Bankruptcy:

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as his own property, under the provisions of the Act of Congress relating to bankruptcy, as his exemptions allowed by law and claimed by him in his schedules filed in the above entitled proceeding.

General Head	Particular Description	Estimated Value
Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption	None	
Property claimed to be exempt by State laws, with reference to the statute creating the exemption		
1. Personal Property : a) Household Goods and equipment Equity interest only Rem. R. S., Sec. 563. b) Wearing Apparel—R.R.S., Sec. 563.	Located at 3227-21st Avenue West Seattle, Wash. 250.00 250.00	250.00 250.00
2. Real Estate : Exempt under Rem. Rev. Stat., Sec. 552 and 553, Laws of the State of Washington. Equity interest only Declaration of Homestead filed with King County Auditor October, 1948 Receiving N. 3845427	Lot 18, Block 14 Gilman's Addition to City of Seattle, according to plat thereof, recorded in Volume 5, of plats page 93, Records of King County, Washington; situate in County of King, State of Washington Purchase price \$6950.00 Mortgage 6200.00 Bal. on mortgage 5900.00 Bankrupt's interest in prop.	1050.00

/s/ WILLIAM J. McALLISTER,
Trustee.

Dated this 6th day of November, 1948.

Receipt of copy attached.

[Endorsed]: Filed November 18, 1948.

[Title District Court and Cause.]

ORDER APPROVING TRUSTEE'S REPORT
OF EXEMPTIONS

At Seattle, in said district, on the 29th day of April, 1949.

It appearing to the Court that the trustee herein has more than ten (10) days prior to the entry of this order filed his report of exempted property in accordance with law, and no objections having been taken thereto,

It Is Ordered that the said trustee's report of exempted property be and the same hereby is, in all things confirmed, and the bankrupt's claim to exemptions is hereby allowed accordingly.

It Is Further Ordered that the property specified in such report be and the same is hereby set apart to the bankrupt as exempt and ordered delivered to said bankrupt forthwith.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed April 29, 1949.

[Title District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE

Comes now William J. McAllister, Trustee, and respectively shows:

I.

That he is the duly qualified and acting Trustee in Bankruptcy herein.

II.

That prior hereto and during the year 1947 the Bankrupt herein entered into a conditional Sales Purchase Contract covering one Cold Spot refrigerator, one davenport, two chairs, an oil heater and one radio at a price of, to wit: Six hundred twenty-seven dollars and fifty-two cents (\$627.52), in which Sears, Roebuck and Co. of Seattle, Washington was named as vendor and four hundred fifty-four dollars and fifty-two cents (\$454.52) remains unpaid on the purchase price. That said transaction was evidenced by an agreement in writing and that title to said merchandise was reserved in said vendor pending payment of the full purchase price.

III.

That possession of said personal property was delivered to said Bankrupt during the year 1947 or prior thereto, and said contract and agreement was in writing and was never filed and indexed in the office of the County Auditor of King County, Washington, the place where said contract was completed

and negotiated and the county of the residence of the vendor and said vendee.

IV.

That vendee in said contract was adjudicated a Bankrupt in the above entitled court on the day of November, 1948 and title to said merchandise, by operation of the law, has become vested in the Trustee in Bankruptcy herein, as well as the right to receive any moneys unpaid upon the purchase price.

V.

That said vendor claims some interest in said merchandise by way of a reserve title therein or by way of a claimed right to receive any moneys remaining and unpaid on the purchase price thereof, that any claims of said vendor are adverse to the claims and title of the Trustee herein.

Wherefore, the Trustee herein prays an Order to Show Cause be entered herein requiring said Sears, Roebuck and Co., a corporation, to appear herein on a day certain and show cause why it shall not be adjudged herein that the title to said personal property hereinabove described and the right to receive the balance due on the purchase price thereof has not vested in the Trustee in Bankruptcy herein.

/s/ WILLIAM J. McALLISTER,
Trustee.

State of Washington,
County of King—ss.

William J. McAllister, being first duly sworn, on oath, deposes and says:

That he is the duly acting and qualified trustee in the above entitled estate; that he makes the foregoing Petition knowing the contents thereof, and believes the same to be true.

/s/ WILLIAM J. McALLISTER.

Subscribed and Sworn to before me this 4th day of December, 1948.

[Seal] /s/ JAMES J. KEESLING,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed December 7, 1948.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

On this 7th day of December, 1948, this matter came on regularly to be heard before Van C. Griffin, Referee in Bankruptcy, upon the presentation of a petition filed by the Trustee in Bankruptcy herein, praying that said Sears, Roebuck and Co., a corporation, be required to show cause herein why it should not be adjudged that title to the following property, one Cold Spot refrigerator, one davenport, two chairs, an oil heater, and one radio, heretofore sold by said Sears, Roebuck and Co., a corporation, to the Bankrupt herein on conditional

Sales Contract, has not fully vested in the estate herein and is not an asset subject to administration herein for the benefit of creditors herein, and likewise show cause why the estate herein shall not be entitled to receive any and all moneys remaining unpaid on the said merchandise, and show cause why the estate herein shall not be entitled to receive all moneys unpaid on the purchase price from the bankrupt herein:

And the court, having heard and considered said petition, does now Order and Direct that Sears, Roebuck and Co., a corporation, be and it is hereby ordered to show cause herein why the prayer of said petition shall not be granted; and the hearing on the return of this order to show cause be and the same is set to be heard before the undersigned, referee in Bankruptcy herein in Room 601 in the United States Court House in Seattle, Washington, on the 21st day of December, 1948 at the hour of 10 a.m. of the said day and that a copy of this order be served on said Sears, Roebuck and Co., a corporation, at least ten (10) days before the return day as named herein by registered United States mail.

Dated and entered this 9th day of Dec., 1948.

/s/ VAN C. GRIFFIN,

Referee.

Presented by:

/s/ WILLIAM J. McALLISTER,

Trustee.

[Endorsed]: Filed December 7, 1948.

[Title of District Court and Cause.]

RETURN ON ORDER TO SHOW CAUSE

Comes now Sears, Roebuck and Co., a corporation, and for return to the Order to Show Cause issued to it on the 7th day of December, 1948, in the above entitled matter and signed by Van C. Griffin, Referee, respectfully shows and alleges as follows, to-wit:

I.

That this respondent, Sears, Roebuck and Co., a corporation, is now and at all times herein mentioned was engaged in a retail merchandise business in Seattle, King County, Washington, and on the several dates hereinafter set forth delivered to Keith N. Vallier, the above named bankrupt, that certain merchandise set out opposite said respective dates under Conditional Sales Contracts as follows:

Date	Merchandise	Price	Carrying Charges
Aug. 25, 1941	Oil heater	\$ 92.65	\$ 6.00
Oct. 31, 1947	One davenport and two chairs	314.02	23.00
Nov. 12, 1947	One Coldspot refrigerator	195.65	15.50
Dec. 23, 1947	One Radio	25.70	2.00
Apr. 12, 1948	Clothing	12.91	1.00

II.

That on each of said dates a memorandum of such sale was reduced to writing stating the terms and conditions including the rate of interest and the purchase price exclusive of interest, insurance and all other charges and thereupon signed by the vendor and the vendee.

III.

That each of said Memorandum of Conditional Sale contained the following covenant upon the part of the bankrupt, to-wit:

“Until full payment is made, I agree that title to and right of possession of the merchandise shall remain in you.”

IV.

That the said bankrupt has not made full payment of said merchandise and that the title to said merchandise has been at all times since said delivery and is now in the respondent, Sears, Roebuck and Co., under and by virtue of the laws and statutes of the State of Washington.

V.

That said merchandise consisting of household goods and personal effects is in the possession of the bankrupt. That said bankrupt has made claim in this cause to said merchandise as exempt under the laws and statutes of the State of Washington, and the respondent believes and therefore alleges that said bankrupt is entitled to have said claim of exemption to said merchandise allowed.

VI.

That said conditional sale of said merchandise does not constitute a preference under the terms and provisions of the bankruptcy act.

VII.

That title to said merchandise has never vested in the trustee of the bankrupt estate.

VIII.

That the bankrupt estate is not entitled to receive any moneys unpaid on the purchase price of said merchandise and that any allowance of any claim to said unpaid portion of the purchase price would constitute an unfair and discriminatory penalty against the respondent vendor, and would constitute a taking of the respondent's property without due process of law in contravention of the Constitution of the United States of America.

Wherefore, the respondent Sears, Roebuck and Co., respectfully prays that the petition filed by the Trustee in bankruptcy herein be dismissed and that the Referee shall find that no title to said merchandise has ever vested in the bankrupt or the Trustee or said bankrupt estate.

Respectfully submitted,

SEARS, ROEBUCK AND CO.,

a corporation,

By /s/ HENRY ELLIOTT,

Its Attorney.

ELLIOTT & LEE,

Attorneys for Sears, Roebuck
and Co.

Receipt of copy attached.

[Endorsed]: Filed December 28, 1948.

[Title of District Court and Cause.]

MEMORANDUM DECISION

The schedules disclose that the bankrupt had purchased from Sears, Roebuck & Company certain household furniture on conditional sales contracts upon which a substantial balance was still owing, and he included this property in his claim of exemptions.

The trustee filed his report of exempt property, awarding to the bankrupt not the full legal title, but his equity interest or vendee rights to purchase the property and thereafter the Referee entered an order approving the trustee's report of exempt property.

Upon the petition of the trustee the Referee issued an order directed to Sears, Roebuck & Company to show cause why their security interest under said contracts of conditional sale was not void as to the trustee because it had not been filed, and show cause why the trustee was not entitled to be vested with the title in said property as security for the payment of the balance thereon, and why he should not receive the balance of the payments for the use and benefit of all creditors.

From the return on order to show cause and from the schedules, records, and files herein, and at the hearing, it appeared without controversy that Sears, Roebuck & Company sold and delivered to the bank-

rupt on conditional sales contracts on the dates indicated below the articles therein referred to:

Date	Merchandise	Price	Carrying Charges
Aug. 25, 1941	Oil Heater	\$ 92.65	\$ 6.00
Oct. 31, 1947	One davenport, Two Chairs..	314.02	23.00
Nov. 12, 1947	One Coldspot Refrigerator	195.65	15.50

It further appeared that said contracts were never filed as provided by Section 3790, Remington's Revised Statutes. Section 70 C of the Bankruptcy Act provides in part as follows:

"The trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; and as to all other property, the trustee shall be deemed vested as of the date of bankruptcy with all the rights, remedies and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists."

Thus the trustee had the authority that a creditor would have had the day before bankruptcy to attach this property and thereby divest the security holders of whatever interest they may have had because their security had not been filed.

This conclusion is in accord with equity and justice because on the day before filing the petition in

bankruptcy, Sears, Roebuck & Company held security that was void as to creditors.

If the respondent were allowed to prevail in this contention, the result would be to rejuvenate their security rights which they had lost. In the case of *In re Farmers' Co-op Co.* 202 Fed. 1008,

"... where a conditional contract of sale was not filed as required by the state statute and was void as to subsequent creditors, it was held that the property became a part of the general estate for the benefit of all creditors. The court said, 'If that were important the files in this case show that there are creditors both prior and subsequent to the date of the conditional sale contract here involved ...' See also *Moore v. Bay*; 76 A.L.R. 1198; *Local Loan Co. v. Hunt*, 292 U.S. 234, 78 L. Ed. at page 1235.

The Referee finds and concludes that under the Bankruptcy Act and under the adjudicated cases, and upon equitable principles, the vendor's interest in the foregoing conditional sales contracts passed to, and is now vested in the trustee in bankruptcy, and he therefore is entitled to collect and receive for the use and benefit of all creditors, including the respondent, Sears, Roebuck & Company, the balance of payments owing on the contracts.

Dated at Seattle, April 28, 1949.

/s/ VAN C. GRIFFIN,

Referee in Bankruptcy.

[Endorsed]: Filed April 29, 1949.

[Title of District Court and Cause.]

ORDER ON SHOW CAUSE AS TO
SEARS, ROEBUCK & COMPANY

On the 28th day of December, 1948, this matter came on regularly to be heard before the Honorable Van C. Griffin, Referee in Bankruptcy herein, upon the return of an order to show cause heretofore served on Sears, Roebuck & Company, as shown by the records and files herein, and said respondent personally appearing by Mr. Henry Elliott, his attorney and the Trustee, William J. McAllister appearing personally herein, and it appearing to the court that said respondent is required to show cause why it shall not be adjudged and determined herein that the estate herein is the owner of One (1) oil heater, one (1) davenport, Two (2) chairs, One (1) Coldspot refrigerator, and it appearing to the court from the evidence adduced that during the year 1947 the bankrupt *here* herein agreed to purchase the said personal property from said respondent under the terms of a conditional sales contract, and that said respondent failed to cause said conditional sales contract to be filed and indexed in the office of the Auditor of King County, Washington, as provided by law, and that on divers and sundry dates more than ten days subsequent to the time that said personal property was placed in the possession of the bankrupt, various creditors of said bankrupt furnished credit to the said bankrupt; and

It further appearing to the court that said per-

sonal property is presently in the possession of the Trustee in Bankruptcy herein for the use and benefit of the estate herein, and the court being otherwise fully advised in the premises, now, Therefore,

It is Ordered, Adjudged and Decreed as follows:

1. That the sale by the said respondent to the said bankrupt was and is an absolute sale and that the absolute title to said personal property has vested in the estate herein and is subject to sale and disposal under order of court herein by the Trustee in Bankruptcy herein, in the due course of admission,

2. That the estate herein and the Trustee in Bankruptcy is entitled to receive from the bankrupt herein the balance due on the purchase price of said personal property and the rights of the estate are the same as respondent's would have been had they filed seasonably.

Done In Open Court this 13th day of May, 1949

/s/ VAN C. GRIFFIN,

Referee.

Presented by:

/s/ WILLIAM J. McALLISTER,

Trustee.

Receipt of copy attached.

[Endorsed]: Filed May 13, 1949.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Judges of the Above-Entitled Court; to Van C. Griffin, Esquire, Referee in Bankruptcy; to the Trustee in Bankruptcy; and to All Persons Concerned or Interested in the Above-Named Estate.

Petitioner Sears Roebuck and Company, a corporation by its undersigned attorneys of record herein, hereby take exception to the order of the referee herein entered herein on May 5, 1949, with respect to an order to show cause directed to the Petitioner; petitions for a review and reversal thereof, and respectfully represents as follows, to wit:

I.

Petitioner, Sears Roebuck and Company, is a corporation, duly organized under the laws of the state of Illinois, and now and at all times herein mentioned is and was authorized and qualified to do business under the laws of the state of Washington, having paid its annual license fees last due said state.

II.

Petitioner is aggrieved by the order entered in this matter by the referee on May 13, 1949, which order was issued pursuant to an order to show cause directed to petitioner. Your Petitioner believes and therefor avers that said order is in error in hold-

ing; that the sale by the petitioner to the Bankrupt of the following personal property on five conditional sales contracts as follows, to wit:

Date	Merchandise	Price	Carrying Charges
Aug. 25, 1949	Oil Heater	\$ 92.65	\$ 6.00
Oct. 31, 1947	Davenport & 2 chair.....	314.02	23.00
Nov. 12, 1947	Refrigerator	195.65	15.50
Dec. 23, 1947	Radio	25.70	2.00
Apr. 12, 1948	Clothing	12.91	1.00

was absolute, and that the title to the property has vested in the estate herein and is subject to sale and disposal under order of court by the trustee in Bankruptcy, and that the trustee is entitled to receive from the bankrupt the balance due on the purchase price of said personal property, which property was claimed by, and allowed to the bankrupt as an exemption under the laws of the state of Washington. It is the contention of the Petitioner that having been claimed as an exemption by the Bankrupt, none of the title to the property has vested in the estate, and that further, the last two items above referred as sold to the Bankrupt are below the value of \$50.00 and are within the exception to the requirements of Rem. Rev. Stat. 3790.

III.

No testimony was taken nor evidence introduced in support of said order.

IV.

Petitioner immediately and timely objected to the application of said order and at all times has main-

tained an objection to the proposal to enter said order, and to the entry thereof.

Wherefore your petitioner prays that the referee prepare a certificate on review and transmit to the Honorable court all original and material papers in this matter, including:

1. Trustee's report on exemptions.
2. Order approving Trustee's report on exemptions.
3. Trustee's petition for order to show cause.
4. Order to show cause.
5. Referee's memorandum decision dated April 28, 1949.
6. Order on Show Cause entered May 13, 1949.
7. Memorandum of Authorities submitted by Petitioner.
8. Petition for review

and that said order be reviewed by a Judge in accordance with the act of Congress relating to Bankruptcy; that said order be reversed, and that the court find that the title to the said property remains in the petitioner and that the petitioner is entitled to collect from the bankrupt the balance owing on said contracts.

ELLIOTT & LEE.

By /s/ NELSON T. LEE,

Attorneys for Petitioner.

United States of America,
Western District of Washington,
County of King—ss.

Nelson T. Lee, being first duly sworn on oath,
deposes and says:

That he is one of the attorneys for Sears Roebuck and Company, a corporation, petitioner herein, and makes this verification for and on behalf of Petitioner, and is duly authorized to so do; that the matters contained herein are true and correct, to the best of affiant's belief, and that this petition for review is not prosecuted for delay, but in good faith in the belief that said order is erroneous.

/s/ NELSON T. LEE.

Subscribed and Sworn to before me this 23rd day
of May, 1949.

[Seal]: /s/ PHILIP J. WEISS,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of Copy attached.

[Endorsed]: Filed May 23, 1949.

[Title of District Court and Cause.]

SUMMARY OF THE EVIDENCE

The trustee filed a petition for order to show cause and in response to said order Sears, Roebuck & Company filed a return to order to show cause,

but no evidence was offered by either party. Upon the hearing of the issues so tendered and in oral argument before the Referee it was admitted:

1. That the oil heater, Cold Spot Refrigerator, davenport, and chairs were sold by Sears, Roebuck & Company to the bankrupts on conditional sales contract and the same was never filed.

2. That there were creditors now unpaid subsequent to the sale and delivery of the furniture.

3. That the agreed price of the radio and clothing set forth in the return was less than \$50.00 and, therefore, the trustee had no interest in those contracts.

Dated at Seattle, this 11th day of June, 1949.

/s/ VAN C. GRIFFIN,

Referee in Bankruptcy.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Lloyd L. Black,
United States District Judge:

I, Van C. Griffin, Referee in Bankruptcy in charge of this proceeding, do hereby certify:

In Schedule A-2 attached to the bankrupt's petition it appeared that Sears, Roebuck & Company held a conditional sale contract as security for indebtedness, and in Schedule B-5 the bankrupt

claimed his household goods as exempt. The trustee in his Report on Exemptions allowed to the bankrupt not the specific property but only the equity interest, which was the vendee's interest to purchase from Sears, Roebuck & Company, and this report was approved by the Referee.

Thereafter, the trustee filed a petition in which he recited that Sears, Roebuck & Company had sold to the bankrupt certain household furniture on conditional sale contract and that the contract was not filed as provided by statute and that, therefore, he was entitled to be subrogated to the rights of the vendor and was entitled to receive the payments from the bankrupt. In response to an order issued upon said petition, Sears, Roebuck & Company filed its return, a hearing was had, a brief was submitted, and an order was entered to the effect that the vendor's interest in conditional sale contracts under which the oil heater, davenport, two chairs, and one Coldspot Refrigerator were sold by Sears, Roebuck & Company to the bankrupts now should be vested in the trustee and the trustee alone should have the right to receive the balance owing on the contracts. Sears, Roebuck & Company have petitioned for review of this order.

Statement of the Questions Presented

In a case where a vendor under a conditional sale contract retains title as security but does not file the same as required by Remington's Revised Stat-

utes Section 3790 and there are subsequent creditors, may the Bankruptcy Court apply the provisions of Section 60 of the Bankruptcy Act and hold that the security title is voidable and on due notice order such lien or title to be preserved for the benefit of the estate, in which event the lien or title shall pass to the trustee?

May the same results be reached by applying to the transaction the provisions of Section 70 (c) of the Bankruptcy Act, which vests in the trustee all the rights of a creditor holding an execution because the failure of Sears, Roebuck & Company to properly file their conditional sale contract gave them no rights to intervene against the action of an attaching creditor, and so far as they are concerned that is in effect what is done when the vendor's interest in the contract is vested in the trustee as was done in this order?

Papers Transmitted

I transmit herewith the following documents:

1. Trustee's Report of Exempt Property.
2. Order Approving Trustee's Report of Exemptions.
3. Trustee's petition for order to show cause.
4. Order to Show Cause.
5. Return on Order to Show Cause.
6. Referee's Memorandum Decision.

7. Order on Show Cause as to Sears, Roebuck & Company.

8. Memorandum of Authorities.

9. Petition for Review.

10. Referee's Summary of the Evidence.

Dated this 11th day of June, 1949.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed June 11, 1949.

[Title of District Court and Cause.]

ORDER ON SEARS, ROEBUCK & COMPANY'S
PETITION FOR REVIEW

On the 29th day of August, 1949, this matter came on regularly to be heard before the Honorable Lloyd L. Black, United States District Judge, upon the petition of Sears, Roebuck & Company for a Writ of Review of an Order on Show Cause of the Referee in Bankruptcy herein entered on the 5th day of May, 1949, and said Sears, Roebuck & Company appearing by and through its attorneys, Elliott & Lee and the trustee William J. McAllister appearing personally herein and the court having heard the arguments of respective counsel in the matter and having read the briefs filed herein on behalf of each party and it appearing to the

court and the court finding from the evidence adduced before it and from the referee's certificate and the record that during and about the year 1947 the bankrupt herein agreed to purchase certain personal property from said Sears, Roebuck & Company under the terms of conditional sales contracts and that said Sears, Roebuck & Company failed to cause said conditional sales contracts to be filed and indexed in the office of the auditor of King County, Washington as provided by law and that more than ten days subsequent to the time that said personal property was placed in the possession of the bankrupt various creditors of said bankrupt furnished credit to the bankrupt; and

That evidence was presented to the court and the court finding that the household furniture was worth more than Five Hundred (\$500.00) Dollars and it further appearing from the evidence and records and the court finding that the bankrupt duly claimed an exemption in the amount of Two Hundred Fifty and no/100 (\$250.00) Dollars equity interest in said household furniture, and the court being otherwise fully advised in the premises, now, Therefore,

It Is Ordered, Adjudged, and Decreed that the Order of the Referee in Bankruptcy on Show Cause entered on the 5th day of May, 1949, upon the record and the evidence before this court, be and the same is hereby sustained in all particulars and that

this order is made and based upon the records and the evidence before the court.

Done in Open Court this 13th day of December, 1949.

/s/ LLOYD L. BLACK,
Judge.

Presented by:

/s/ WILLIAM J. McALLISTER,
Trustee.

Receipt of Copy attached.

[Endorsed]: Filed December 13, 1949.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

On this date this matter coming on duly and regularly upon the application of Sears, Roebuck and Co., a corporation, respondent, and it duly appearing that said respondent has this date filed herein a Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit, under Rule 73 (b), from that certain Order On Sears, Roebuck and Company's Petition for Review, made and entered in this action on the 13th day of December, 1949, sustaining that certain order of the Referee in Bankruptcy on show cause, entered on the 5th day of May, 1949, and it duly appearing that said respondent Sears, Roebuck and Co. did make and cause to be entered herein exceptions to said order

for review sustaining said order of the Referee in Bankruptcy, and the court being otherwise fully advised in the premises,

Now, Therefore, It Is Hereby Ordered that said appeal be and hereby is allowed.

Done in Open Court this 11th day of January, 1950.

/s/ LLOYD L. BLACK,
Judge.

Presented by:

/s/ NELSON T. LEE,
One of the Attorneys for the Respondent, Sears,
Roebuck and Co.

[Endorsed]: Filed January 11, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73 (b)

Notice is hereby given that Sears, Roebuck and Co., a corporation, respondent, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from that certain Order On Sears, Roebuck and Company's Petition For Review, entered in this action on the 13th day of December, 1949.

ELLIOTT & LEE,
/s/ FRANK HUNTER,

Attorneys for Respondent,
Sears, Roebuck and Co.

[Endorsed]: Filed January 11, 1950.

308 U. S. Court House

January 12, 1950.

Mr. William J. McAllister
1410 Hoge Building
Seattle, Washington

In the Matter of Keith N. Vallier,
Whose Wife Is Irene Helen Vallier,
Bankrupt, In Bankruptcy No. 37894

Dear Sir:

In accordance with Rule 73(b) of Federal Rules of Civil Procedure, we are enclosing copy of Notice of Appeal to Circuit Court of Appeals Under Rule 73(b) filed in this office January 11, 1950, by Messrs. Elliott & Lee and Frank Hunter, Attorneys for Sears, Roebuck and Co. There is also enclosed copy of Order Allowing Appeal signed by the Honorable Lloyd L. Black, Judge of the U. S. District Court, on January 11, 1950.

Yours very truly,

MILLARD P. THOMAS,
Clerk.

By /s/ HELEN M. WHITE,
Deputy.

HMW-s
Encs.

[Endorsed] Filed January 12, 1950.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents: That we, Sears, Roebuck and Co., a corporation, as principal, and Aetna Casualty and Surety Company, a corporation, as surety, acknowledge ourselves to be jointly indebted to William J. McAllister, as Trustee in the matter of Keith N. Vallier, whose wife is Irene Helen Vallier, Bankrupt, appellee in the above cause, in the sum of \$250.00, conditioned that, whereas, on the 11th day of January, 1950, the District Court of the United States for the Western District of Washington, Northern Division, in a suit depending in that court, wherein Sears, Roebuck and Co., a corporation, was respondent, and William J. McAllister, as Trustee, was the petitioner, numbered on the civil docket as In Bankruptcy No. 37894, an order was entered against said Sears, Roebuck and Co., a corporation, respondent, affirming an order of the Referee in Bankruptcy entered on the 5th day of May, 1949, and the said Sears, Roebuck and Co., a corporation, respondent, having filed in the office of the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, the condition of the above obligation is such that if the said Sears, Roebuck and Co., a corporation, respondent, shall prosecute its appeal to

effect and answer all costs, if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified, then the above obligation is void, else to remain in full force and effect.

SEARS, ROEBUCK AND CO.,
A Corporation, Principal.

By /s/ NELSON H. LEE,
One of Its Attorneys.

AETNA CASUALTY AND
SURETY CO.,
A Corporation, Surety.

[Seal] By /s/ J. L. WARNER,
Resident Vice President.

Attest:

/s/ ROBERT B. ROURKE,
Resident Asst. Secretary.

Approved this 12th day of January, 1950.

/s/ LLOYD L. BLACK,
Judge.

[Endorsed]: Filed January 12, 1950.

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 37,894

In the Matter of
KEITH N. VALLIER, Whose Wife Is Irene
Helen Vallier,

Bankrupts.

Black, J.

August 29, 1949.

Appearances:

ERVIN F. DAILEY,

Attorney-at-Law for and on Behalf of
Bankrupts;

WILLIAM J. McALLISTER,

Attorney-at-Law for and on Behalf of
Trustee;

HENRY ELLIOTT,

Attorney-at-Law for and on Behalf of
Creditor, Sears, Roebuck & Co.

Be It Remembered that the above matter was
called for hearing on the certificate on review of
the Referee in Bankruptcy;

Whereupon all parties consented by oral stipula-
tion that hearing should be continued until Sep-
tember 3, 1949; and such continuance was so or-
dered by the Court.

HEARING ON REFEREE'S CERTIFICATE
ON REVIEW

Pursuant to notice, the above-entitled and numbered matter came on regularly for hearing, on this 3rd day of September, 1949, at the hour of 9:00 o'clock a.m., before the Honorable Lloyd L. Black, Judge of the above-entitled court.

Appearances:

NELSON T. LEE, ESQ., and
SHIRLEY BOYD WILLIAMS,

(Of Messrs. Elliott & Lee), appearing as
Attorneys for and on Behalf of Sears,
Roebuck;

WILLIAM J. McALLISTER, ESQ.,
Trustee, Appearing on Behalf of the
Trustee.

Thereupon, the following proceedings were had,
and evidence given, to wit: [1*]

The Court: In the matter of Keith N. Vallier,
is Mr. Vallier here?

Mr. Lee: No, he is not here. I contacted his
attorney, and I was informed that he is in Cali-
fornia.

The Court: What is that?

Mr. Lee: They are both in California.

The Court: Is the Trustee present? Who is rep-
resenting the Petitioner, Sears Roebuck?

Mr. Lee: I am. Mr. Elliott is not going to be

* Page numbering appearing at top of page of original Reporter's
Transcript.

here this morning, and I am appearing in his place.

Mr. Williams: I am also.

The Court: Are there any witnesses for Sears Roebuck?

Mr. Lee: No.

The Court: Are you ready to proceed?

Mr. Lee: Yes, Your Honor.

The Court: The Trustee may be sworn.

WILLIAM J. McALLISTER

the Trustee, being first duly sworn, was examined and testified as follows:

Questions by the Court

Q. Have you an inventory of the household goods and furniture of the bankrupt?

A. Yes, I have, Your Honor.

Q. May I see it? I am interested in it (witness hands [2] document to Court).

Q. Have you viewed the premises?

A. No, I have not.

Q. Do you know whether there is any silverware?

A. Yes, there is, I think, some silverware. As I recall, when I talked to Mr. Dailey, he told me that they bought it from an Army Surplus Store, as I recall.

Q. Do they have any pots and pans?

A. I assume that they do. I don't know.

Q. How did you arrive at the valuation of \$250.00 as the equity?

(Testimony of William J. McAllister.)

A. They have paid—the total amount of the property which has been listed by them as having, household goods and so forth, which they bought on conditional sales contract, they paid that amount.

Q. I realize that, but that merchandise that was bought on conditional contract consisted of an oil heater, one davenport, two chairs, and one Coldspot refrigerator. You do not mean to say that you think that a man and wife are living with nothing but an oil heater and one davenport and two chairs and one Coldspot refrigerator, do you?

A. Well, they have the right, as I took it, to select whatever they wanted.

Q. You think that they did not select the dining room chairs [3] and table, and kitchen chairs and kitchen table, and pots and pans and cutlery?

A. Frankly, I did not give it that thought, to be candid with you.

Q. This \$250.00 is merely supposed to represent the amount paid on these particular items?

A. That is right.

Q. What about the radio?

A. Of course, there are certain items in there which are under \$50.00.

Q. Yes, I understand, but are they claiming the radio was exempt? A. They did.

Q. Was it allowed?

A. It was by me—it was, yes.

Q. But you personally have not seen the premises? A. No, I have not.

(Testimony of William J. McAllister.)

Q. You say that you were told they had bought some things from the Army Surplus?

A. Yes, that is correct.

Q. Do you know how many beds they have?

A. No, I do not.

Q. Or how much bedding?

A. The people have not been here, frankly, that is the reason why. They were East for a short while, and then [4] they went to California, and apparently they are working down there. I have not been actually in a position to state, because this thing has been pending so long here.

Q. I see.

A. But they are coming back.

Q. Do you know whether they have had rugs and carpets, a camera, dishes and glassware, and pots and pans?

A. I cannot say.

Q. You are unable to say?

A. That is correct.

Q. All right. Now, have you seen these particular items that you have testified about?

A. No, I have not seen any items that the people have.

The Court: All right.

Mr. Lee: I just would like to ask a question or two.

The Court: You may.

Questions by Mr. Lee

Q. Are these items, Mr. McAllister, that are set out in the inventory—pardon me—which are

(Testimony of William J. McAllister.)

in the return that was made to the order to show cause, the oil heater, the davenport, the two chairs, the Coldspot refrigerator, and the radio and the clothing—the possession of those items was allowed to remain in Mr. [5] Vallier, is that right?

A. That is right.

Q. And to the best of your knowledge, he still has those? A. Yes, sir.

Q. And those items never were taken into your possession? A. No, they were not.

Mr. Lee: That is all.

The Court: I will ask a further question. Had these people been living in Seattle?

The Witness: Yes.

The Court: At the time they filed the petition?

The Witness: Yes.

The Court: Where?

The Witness: Well, offhand, I do not know the address, but I know that they were living in Seattle.

The Court: Do you have any reason to believe that they did not have the ordinary bedding and household goods, furniture, and utensils?

The Witness: No. I assume that they did, as a matter of fact.

The Court: All right. You may be excused.

(Witness excused.)

The Court: Do you wish to put on a witness on behalf of Sears Roebuck?

Mr. Lee: No, Your Honor. I believe the record will [6] speak for itself as far as we are concerned.

The Court: All right. Gentlemen, I have some inclinations that I can state now, before you argue, or, if you desire, you may argue first, and then I will give you my views. The handicap to you is that if I give you my inclinations as to the facts and the law first, you may have a harder task, but at least you will know in what respect I am right, in your opinion, or wrong, if I give you my views.

Now, which do you want? Do you want me to give you my inclinations as to facts and the law first? I have read your briefs.

Mr. Williams: Well, personally, I would prefer to have your inclinations first, Your Honor.

The Court: All right. Does anyone else have any different view?

In the matter of the Vallier case, the reasonable inference is, from the evidence and the record, that the household goods and furniture were worth more than \$800.00, exclusive of beds and bedding. Whether the radio was or was not a portion of the household goods and furniture is of minor moment, because the radio is not worth a great deal, but the reasonable inference is that the radio was part of the household goods and furniture, and must be calculated in the valuation. [7] In the Vallier case, there are only a few items that are under conditional sales contract involved in this proceeding. The radio is not involved in this proceeding, except

as I must calculate its value in arriving at the total valuation.

My recollection is that there is about \$421.00 due on just a few items. The reasonable inference is that the goods are worth sufficiently above \$421.00, or sufficiently above \$406.00, to make it worth while for the bankrupt to pay that balance. The bankrupt is anxious to pay it. In the absence of rather convincing evidence, I must conclude that the property itself is worth more than the amount due. The reasonable inference is that the bankrupt had the general items of furniture, including dishes, pots and pans, silverware, and the various other items that allow his family to exist, and I therefore must conclude that the valuation of all the household goods and furniture, exclusive of the beds and beddings at the time that he went into bankruptcy, and at the present time, exceeded \$500.00—reasonably exceeded \$500.00. To say otherwise would be to say that all the various items had a value of substantially less than \$100.00, other than the items under contract, and I doubt that it is reasonable to infer that the other items, although rather numerous [8] in number, would be of such trivial worth, and yet the bankrupt would be supplementing such trivial items with a few items of substantial value.

It would seem to me that I would not be justified in finding that the value was less than substantially over \$500.00. The record also would indicate that, because it shows that the equity was of a certain amount, and then there was a balance of some \$400.00. So that equity in all of the goods owned by

him, and the value of these goods actually owned by him, plus the balance, again exceeds \$500.00.

* * *

The Court: I think that the question of household goods and furniture exceptions, and the rights of the trustee, or the vendor under unfilled contracts, depends upon whether or not the goods as an entirety were clearly exempt, or whether all of the goods, assuming they were fully paid for, had a value in excess of \$500.00. If they have, how can the vendor say which items were exempt, and which were not exempt?

Now, I have given you gentlemen my inclinations and you may respectively argue the matter. Mr. Vallier's trustee wins, and Sears Roebuck loses in that situation.

* * *

The Court: I am very glad to give Counsel for the [9] vendors the opportunity in the Vallier and Gerteis cases, to submit authorities. As to the trustee in these two cases, the trustee of course is entitled to submit authorities persuading me that my information is correct, just as the vendor in the Woo case may want to reassure me as to the correctness of its position.

* * *

The Court: Now, if you gentlemen would like to submit any further briefs, in view of the informal attitudes I have expressed, or the informal informations, you may. You are not bound by anything that I have said. In no respect has there been a ruling

upon anything. As I told you in the beginning, it is rather likely that my inclinations will ripen into decisions, but if you gentlemen will convince me that I am mistaken, I will not be in the slightest degree embarrassed to rule exactly to the contrary of what I have indicated.

Now, do you want to put in anything more?

Mr. Lee: I realize it is untimely, but I would like to have Mr. McAllister answer a question or two as to the value of the property.

The Court: You may. Mr. McAllister may take the stand. [10]

WILLIAM J. McALLISTER

recalled for further examination, having been previously sworn, was examined and testified as follows:

By Mr. Lee:

Q. Mr. McAllister, did you go to the Vallier home and examine the contents at all?

A. No, I did not.

Q. Do you have any reason to believe that the Vallier's have property other than their equity interest as you have described it, which would exceed the sum of \$500.00?

A. Yes, I have talked with their attorney. As I say, I didn't go out to the premises myself. I intended to. I didn't get around to it at the time when I wanted to go, when they were there. And when I did want to go out, they were not there.

I talked with their attorney, and they, of course, are purchasing the home under a mortgage, and I

(Testimony of William J. McAllister.)

assume that in that home, like in any other normal home, they must have furniture in it. They have a family.

Q. Now, as to the furniture, I believe that this amount that is owed Sears Roebuck, which was originally purchased—the entire amount was \$651.83, and as to the davenport and two chairs, did you place any valuation on that of any kind? Or, let me put it this way, has there ever been, to your knowledge, any valuation placed [11] on an itemization of these various articles of furniture?

A. You mean as——

Q. (Interposing) Individually, in other words.

A. Oh, yes, their selling price.

Q. How did you arrive at that? That was the original purchase price? A. That is right.

Q. Now, I notice that the equity that was allowed, or, rather, that the exemption that was allowed, you said, \$250.00 equity interest on goods that are being purchased on contract from Sears Roebuck.” By that were you indicating that \$250.00 of the \$500.00 exemption would be consumed by their silverware, their bedding, and items other than these articles of furniture which Sears Roebuck sold, and then the remaining \$250.00 would cover these items?

A. Actually, at the time I did that, I was placing the valuation that way.

Q. I also notice that you place under Schedule B-2, \$250.00 for wearing apparel, and that was, of

(Testimony of William J. McAllister.)

course, goods that were purchased from Sears Roebuck, was it not—that is, the clothing that was purchased? A. No. As I recall it, it was not.

Q. Was there not an item of \$12.91 for wearing apparel?

The Court: I might say, Counsel, actually that is [12] not in issue in this case.

The Witness: I do not know.

Mr. Lee: All right, if Your Honor please, those are all the questions I have to ask.

The Court: Of course, the wearing apparel under our statute seems to be automatically exempt. In addition, there was no contention as to the necessity of filing a contract for wearing apparel less than \$50.00.

Mr. Lee: The point I am making is this, Your Honor. In the allowance that was made, there was set forth \$250.00 equity interest, on articles being purchased from Sears Roebuck. Now, if Your Honor is holding, as I understand Your Honor, that if they reach the point of \$500.00, then everything over that—are you holding that everything over \$500.00 is not included?

The Court: No. I am saying that when the goods were worth more than \$500.00, that they were not exempt,—none of them were exempt—except as selected and none in advance for certain, which would be selected, and there being an uncertainty as to what portion of goods would not be represented by the excess, that the vendor's lien goes to the trustee.

(Testimony of William J. McAllister.)

Mr. Lee: Well, if Your Honor please, when the schedule sets out an exemption of \$250.00, which is over two-thirds of the amount still owing, and when it is clear under our state law that a purchaser acquires no interest or no right in a conditional sales contract, and the trustee admits \$250.00 of that which is claimed, I am unable to see, in view of the way that both our State Court and Federal Courts have upheld the rule that a purchaser has acquired nothing—in other words—he has absolutely no ownership in the property—how the trustee acquires any jurisdiction.

The Court: Well, Counsel, I have carefully read your brief.

Mr. Lee: I appreciate that.

The Court: And there were two items in which to my mind are completely contradictory. There was a great deal of that brief that was indicating that it was contrary to the spirit of the exemptions that the bankrupt had to pay the trustee, because the bankrupt was supposed to have property exempt, rather than to have to pay the trustee.

As far as I am concerned, the bankrupt is exactly in the same situation, in being the trustee, as he is in being the vendor. If you had stated in your brief that the vendor was not entitled to anything from the bankrupt, I could have followed the attempted persuasion, but that argument, I felt, had no validity at [14] all, because as far as the beneficiary interest of the law in the welfare of

(Testimony of William J. McAllister.)

the bankrupt is concerned, the law does not wish the bankrupt to pay the trustee, and the law does not wish the bankrupt to have to pay the vendor. So there was no persuasion in that, and I felt that the position was completely contradictory.

Now, on the other phase the brief suggested that the trustee had no authority over the exempt property, and then said under the law of the State of Washington, and the peculiar decisions of this state, that the bankrupt had no interest in the property at all being purchased by contract. If that is true, then of course there was not anything to be exempt by the bankrupt. And, again, it seemed to me that there was a contradiction in position.

If you convince me completely that the bankrupt had no interest in that property until it was fully paid for, that no title passed at all, and no interest passed, then of course the trustee in giving the bankrupt his exemption, and his equity in that property, gave him nothing. He had no equity. And the Vendor is not helped because the trustee gave the bankrupt something that the bankrupt could not get. If the bankrupt had no equity in that property by reason of the purchase under the conditional sales contract, and there is some [15] persuasion in your argument to that effect, then of course the trustee has been too good to the bankrupt, but you are not hurt.

I have not overlooked those two propositions in your brief, and I felt that an analysis of either of

(Testimony of William J. McAllister.)

them was pregnant of hazard of your position, rather than pregnant of help.

Mr. Lee: I would like to make this inquiry of Mr. McAllister. Do you know whether Mr. Vallier will be back in a short time?

The Witness: Yes, he will be.

Mr. Lee: If Your Honor please, I do feel, in all fairness to my client, that I should ask that we be allowed to examine Mr. Vallier, if you will do that.

The Court: I am inclined to allow that. Mr. Vallier was asked to be here, and he is not here, and I do not object to his coming.

Mr. Lee: Do you know when he will return, Mr. McAllister?

The Witness: Mr. Dailey was to contact me during the week and let me know, and his secretary 'phoned me yesterday—well, as a matter of fact, I 'phoned myself, and they had not been able to contact them down there, so I do not know when they will return.

Mr. Lee: It is just a matter of a few days or weeks, is it?

The Witness: It is my understanding that they are working down there, but they are going to return. At least, that is what I have been told.

The Court: I will take the matter under advisement, setting a date for hearing Mr. Vallier, and Counsel may advise me.

The Witness: All right.

(Testimony of William J. McAllister.)

The Court: And the trustee may advise me when he is available. But as to the other matters, they are considered closed, except for briefs. I think you gentlemen all know what my inclinations are, and what I think are the reasons for the inclinations. I will give to the vendors in each instance until and including the thirtieth of this month in which to serve and file such briefs as they wish, and that includes the Vallier case.

Mr. Lee: I do not believe that we will be filing any more briefs, if Your Honor please.

The Court: I will give each of you until that time, and I will give the trustee until then, including the seventh day of October, in which to serve and file any answering briefs that the trustee wishes.

I will give to counsel for the vendors until and including the eleventh day of October to serve and file [17] any reply memoranda as said counsel might wish to present.

I am not requiring the trustee's counsel to do anything, because in each instance the trustee had only a small amount involved. There is not enough involved in the individual cases to justify the trustee or his attorney to make any more effort, and there will be not the slightest criticism by the Court of any trustee or counsel for not having answered.

The Witness: Now, with regard to your views—this may not even have anything to do with our problem, but from a practical standpoint, what is

(Testimony of William J. McAllister.)

your view in relation to the bankrupt's equity—supposing, in other words, he has a \$250.00 equity, and the amount of the property exceeds \$500.00. I am wondering where the bankrupt's equity gets into the picture. Is he allowed it?

The Court: I am inclined to say in this case where the bankrupt claims his equity, and the trustee allows it, or in this case where the trustee allows the equity, that the bankrupt is entitled to have the equity. Maybe the bankrupt trustee did not have to give him his equity. The vendor has not any right to complaint, because the trustee was more generous with the bankrupt than the trustee might have been [18] compelled to be.

My view is that exceptions are intended to be liberal, and where a bankrupt has bought goods under a conditional sales contract, and his interest in the goods is less than \$500.00, if he wants to claim it, that is proper and just that the trustee should allow it. The trustee then would be entitled to the amounts that otherwise would be paid to the vendor. In other words, I am indicating in the Vallier case, and in the Gerteis case, that the bankrupts have the equities that were allowed, and that they are to make the payments of the unpaid balance to the trustee.

(Further argument and discussion between Court and Counsel.)

(Witness excused.) [19]

Further Hearing on Referee's
Certificate on Review

October 17, 1949

The Court: In the Matter of the Keith N. Vallier, Bankruptcy, are the parties ready?

Mr. McAllister: Yes, your Honor.

Mr. Dailey: I am ready.

Mr. Lee: Yes, your Honor.

The Court: I only wished respective counsel here so that it might be determined what I am to do in the matter as to the personal appearance of Mr. Vallier. I indicated a ruling. Counsel for the petitioner wanted the privilege of having Mr. Vallier brought into Court for further examination. I said I would be willing that that be done. He [1*] has not been produced. Now, what about it? Is he to be produced, or should I make my ruling?

Mr. McAllister: Your Honor, we have endeavored to locate Mr. Vallier, and he is not within the state. As a matter of fact, no one knows where he is. His home is being purchased on a contract. He leased it to some people and the realty management firm of Burwell & Morford are taking care of it and receiving payments to take care of a mortgage. They have not heard from Mr. Vallier since last May. Mr. Lee and I went out to the premises last Friday afternoon to check the property again, and all the property is there. We appraised it for what we think it is worth, but other than that we haven't been able to do anything. Mr. Dailey in-

* Page numbering appearing at top of page of original Reporter's Transcript.

forms me he has not heard from Mr. Vallier for a long time. He has endeavored to contact him, and he is not available.

Mr. Lee: If your Honor please, I think in any event that does not affect the rights of the creditor Sears & Roebuck & Company. Frankly, I think Mr. Vallier is not trying to comply with the order of the Referee. There has been nothing done as directed previously, and no one knows where he is. We don't have the opportunity to examine him, which I think we should have. I don't think he is entitled to the relief this Court can give him.

The Court: It is not a question of his being entitled [2] to relief. There is no petition for review to set aside such exemption as he might have. He did appear before the Referee at the time designated by the Referee?

Mr. McAllister: That is correct.

Mr. Dailey: That is correct.

The Court: There seems to be no probability of the bankrupt being available for this Court. He had no reason to expect or suspect that he would be asked to come here.

(Whereupon there was discussion off the record.)

The Court: In the matter of Keith N. Vallier, bankrupt, in connection with the petition for review of the Referee's ruling, the Referee's ruling is sustained. Exception noted and allowed. Appropriate order may be presented to the Court after notice sustaining the referee.

Certificate

I, James R. Royse, do hereby certify that I am official court reporter for the above-entitled Court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ JAMES R. ROYCE,
Official Court Reporter. [3]

[Title of District Court and Cause.]

December 13, 1949

10:00 o'Clock A.M.

EXCEPTIONS TO ORDER SUSTAINING
REFEREE IN BANKRUPTCY

The Court: In the Matter of Vallier Bankruptcy, I have had presented to me this proposed order which is in accordance with my decision. I think both of you will agree that the order is in accordance with my holding. Mr. Lee has made it very evident that he is satisfied that the Court's holding is erroneous, and Mr. Lee, I take it, you would like to except to my entry of this order.

Mr. Lee: Yes, with your Honor's permission.

The Court: You are certainly permitted so to do. Exceptions are noted and allowed.

Mr. Lee: I would like to state my exceptions if I may.

The Court: You may.

Mr. Lee: The respondent excepts to this order for the reason that there has been no evidence taken to support a finding of value. There has been no evidence, either oral or in writing, as I recall, to support any finding of value.

Secondly, under the statute, Remington's Revised Statute 563, the respondent feels that the bankrupt is entitled to a total exemption of \$750. Subsection 1 provides for clothing without a specified value. Subsection 3 provides for household goods of the value of \$500. Subsection 4 provides for \$250 in lieu of certain farm stock or animals.

Thirdly, we except to this order for the reason that the property has never at any time been in the possession of the trustee, is not now in the trustee's possession, and it is my understanding that the whereabouts of the bankrupt at the present time are unknown.

Fourthly, it is our position that this was a conditional sales contract as distinguished from a chattel mortgage. The cases that we cited to your Honor have set forth the situation where a chattel mortgage has been involved and the title was not reserved in the vendor but went into the vendee; and this is a conditional sales contract situation.

Fifthly, we feel that the trustee is not entitled to the balance due from the bankrupt which he has under the order of the receiver for the reason that the property has been claimed as exempt and has never come under the jurisdiction of the receiver;

and, also, we believe that even under the order that your Honor made providing that this fellow did, or assuming that he did obtain or claim an exemption of \$250, he is being allowed to shed the contract or the obligation to the vendor to the extent of \$250 if that amount is set over to him, and all of the items that he has were items that he purchased under the conditional sales contract.

Sixth, we except to the language in the order that during the year 1947 the bankrupt purchased these certain items. I believe we have set forth in the briefs which we have filed before the referee, also the briefs which we submitted to your Honor, that these goods were purchased between 1941 and 1947.

Then we also except for the reason that the unpaid balance on the conditional sales contract does not become a part of the bankrupt's estate, that the bankruptcy is determined as of the date of adjudication of the bankrupt, and that the referee does not have the authority to impose upon the bankrupt the duty or obligation to pay subsequent payments to hold the property of the vendor.

We also except for the reason that it is our impression or the respondent's feeling that the referee only had the authority to pass on the exemption in this case, either to allow it or disallow it.

I believe, if your Honor please, that is all the exceptions we wish to take.

The Court: The Court has heard the exceptions of Mr. Lee. I am a little surprised at his statement

that no evidence was taken because I think that the record will show that at least one witness was sworn. Is that right?

Mr. McAllister: Yes, your Honor.

The Court: I am sure there was evidence taken before the Court. I am satisfied of that. I think this is the first time the suggestion has been made that the bankrupt is entitled to the \$750 exemption, —\$500 on account of furniture and \$250 under the lieu clause. It is the bankrupt, of course, who decides whether or not he wishes to claim under the lieu clause, and what he claims. Certainly, the vendor under a conditional sales contract who chose not to file same as provided by law has no right to have that \$250 lieu clause at its election applied to the protection of the vendor. If the bankrupt is still entitled at this late date to claim the \$250 lieu exemption, I take it that the bankrupt is the one who should decide what property he wished in lieu of the livestock he apparently does not have.

I have no clear recollection as to whether or not this property was all purchased in the year 1947. Certainly, it would make no difference legally whether it was or not, and I am perfectly satisfied to interpolate it in this order, "that during and before the year 1947." Does either counsel know of any difference it makes legally?

Mr. Lee: I was, if your Honor please, just merely setting forth the——

The Court: What about it? Does it make any difference? What are the facts? Were the pur-

chases before 1947? I did have a clear recollection of this, but I haven't it presently in mind.

Mr. McAllister: I have the dates on which the collections were made. There was a mistake in one item that set forth August 25, 1941, which, of course, is an error. That date was a typographical error. As I recall, in my schedule, I think there was one error. I have all the original contracts.

The Court: Were all the purchases in 1947, or were they during and before 1947?

Mr. McAllister: They were during 1947, and one was made in 1948.

Mr. Lee: I will say this, that Mr. McAllister said there was some agreement——

Mr. McAllister: Not agreement.

Mr. Lee: ——or understanding reached that the record was in error. If that was made with Mr. Elliott, I have no knowledge of it.

The Court: I am willing to put it "that during and about the year 1947."

Mr. McAllister: They were all made not earlier than 1947, and there was one sale which was made April 12, 1948.

The Court: I will put "during and about," and I will initial it. It is not my recollection that the Court was advised it made any legal difference as to the exact dates of the contracts, it having been agreed by all parties that the contracts were not filed within the ten days or at all. So I have not carried in my memory the specific dates.

The order as presented with the interpolation of

the words "and about" in line 20 on Page 1 which reads, "during and about," which I have initialed is entered. The exceptions of Mr. Lee are noted.

You may file the order, Mr. Clerk.

Certificate

I, James R. Royse, do hereby certify that I am official court reporter for the above-entitled Court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ JAMES R. ROYSE,
Official Court Reporter.

[Endorsed]: Filed January 26, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, UNITED STATES
DISTRICT COURT, TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of

Civil Procedure, I am transmitting herewith all of the original pleadings on file and of record in said cause in my office at Seattle, together with reporter's transcript of proceedings, as set forth below, and that said pleadings and reporter's transcript constitute the record on appeal from the order filed December 13, 1949, and entered December 14, 1949, to the United States Court of Appeals for the Ninth Circuit, to-wit:

1. Debtor's Petition and Schedules, and Statement of Affairs.

2. Adjudication of Bankruptcy and Order of Reference.

3. Amended Schedule A-3.

4. Bond of Trustee William J. McAllister.

5. Letter from Referee in Bankruptcy to Clerk of Court.

6. Referee's Certificate on Review, attached to which are the following:

- 6-a. Trustee's Report of Exempt Property.

- 6-b. Order Approving Trustee's Report of Exemptions.

- 6-c. Petition for Order to Show Cause.

- 6-d. Order to Show Cause.

- 6-e. Return on Order to Show Cause.

- 6-f. Memorandum Decision.

- 6-g. Order on Show Cause as to Sears, Roebuck & Company.

6-h. Memorandum of Authorities, with statement of unpaid balances attached.

6-i. Petition for Review.

6-j. Summary of the Evidence.

7. Brief of Respondent on Petition for Review of Referee's Order Dated May 13, 1949.

8. Answering Brief of Trustee in Bankruptcy on Petition for Review of Referee's Order Dated May 13, 1949.

9. Reply Brief of Respondent to Answering Brief of Trustee in Bankruptcy on Petition for Review of Order dated May 13, 1949.

10. Notice of Presentation, by Trustee, with proposed form of Order attached.

11. Order on Sears, Roebuck & Company's Petition for Review.

12. Order Allowing Appeal.

13. Notice of Appeal to Circuit Court of Appeals Under Rule 73(b).

14. Copy of letter from Clerk of Court to Mr. William J. McAllister.

15. Cost Bond on Appeal.

15-a. Copy of Clerk's Certificate to Transcript of Record.

16. Appellant's Designation of Contents of Record on Appeal.

17. Reporter's Transcript of Proceedings.

18. Letter from Paul P. O'Brien, Clerk, addressed to Millard P. Thomas, Clerk.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle this day of February, 1950.

MILLARD P. THOMAS,
Clerk,

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy Clerk.

[Endorsed]: No. 12,461. United States Court of Appeals for the Ninth Circuit. Sears, Roebuck & Co., a Corporation, Appellant, vs. William J. McAllister, as trustee in the matter of Keith N. Vallier, whose wife is Irene Helen Vallier, bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed February 13, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Judicial Circuit

No. 12,461

In the Matter of:

KEITH N. VALLIER, whose wife is Irene Helen
Vallier, Bankrupt.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

To the Clerk of the Above-Entitled Court:

The appellant in this cause intends to rely upon
the following points:

1. That the order of the District Court dated
December 13, 1949, sustaining the order of the
referee in bankruptcy on show cause, entered on
the 5th day of May, 1949, is erroneous in that:

- (a) It is contrary to the facts;
- (b) It is not supported by the evidence;
- (c) The bankrupt was not made a party to the
proceeding;
- (d) Neither the referee nor the court had juris-
diction to make the orders in question;
- (e) The decision of the court was based upon
unfounded findings and conclusions;
- (f) The order denies the bankrupt's exemptions
under the state statutes and the Bankruptcy Act;
- (g) The order attempts to bring into the bank-
rupt estate property and earnings of the bankrupt
acquired after his adjudication as bankrupt;

(h) The orders of the court and the referee attempt to make property of the appellant a part of the bankrupt estate;

(i) The orders of the referee and the court constitute an unlawful interference with the contract rights between the appellant and the bankrupt;

(j) Said orders constitute an attempt to take the property of the appellant without due process of law;

And the appellant does hereby designate the following portions of the record material to be considered on this appeal:

1. Trustee's Report of Exempt Property, dated November 6, 1948;

2. Order Approving Trustee's Report of Exemptions dated April 29, 1949;

3. Petition for Order to Show Cause dated December 4, 1948;

4. Order to Show Cause dated December 9, 1948;

5. Return on Order to Show Cause filed December 28, 1948;

6. Referee's Memorandum Decision dated April 28, 1949;

7. Order on Show Cause as to Sears, Roebuck and Co. dated May 13, 1949;

8. Petition for Review dated May 23, 1949;

9. Summary of the Evidence dated June 11, 1949;

10. Referee's Certificate on Review dated June 11, 1949;

11. Order on Sears, Roebuck and Company's Petition for Review dated December 13, 1949;

12. Order Allowing Appeal dated January 11, 1950;

13. Notice of Appeal to Circuit Court of Appeals under Rule 73(b) filed January 11, 1950;

14. Letter from the Clerk of the Court to William J. McAllister dated January 12, 1950;

15. Cost Bond on Appeal dated January 12, 1950;

16. Transcript of Testimony taken on hearing on August 29, 1949; September 3, 1949; October 17, 1949, and December 13, 1949.

/s/ ELLIOTT & LEE,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 20, 1950.



No. 12461

United States
Court of Appeals
For the Ninth Circuit.

SEARS, ROEBUCK & CO., a Corporation,
Appellant,

vs.

WILLIAM J. McALLISTER, as trustee in the
matter of Keith N. Vallier, whose wife is Irene
Helen Vallier, bankrupt,
Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court
Western District of Washington,
Northern Division.

SCHEDULE B-2

Personal Property

A. Cash on hand.

None.

B. Negotiable and non-negotiable instruments and securities of any description, including stock in incorporated companies, interests and in joint stock companies, and the like (each to be set out separately).

None.

C. Stock in trade, in business of the value of

None.

D. Household goods and furniture, household stores, wearing apparel and ornaments of the person.

Equity in household goods and furnish-

ings\$250.00

Wearing apparel 250.00

E. Books, prints and pictures.

None.

F. Horses, cows, sheep, and other animals, (with number of each)

None.

G. Automobiles and other vehicles

None.

H. Farming stock and implements of husbandry.

None.

I. Shipping, and shares in vessels.

None.

J. Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated.

None.

K. Patents, copyrights, and trademarks.

None.

L. Goods or personal property of any other description, with the place where each is situated.

None.

Totals\$500.00

/s/ KEITH N. VALLIER,
Petitioner.

STATEMENT OF UNPAID BALANCES AT-
TACHED TO MEMORANDUM OF AU-
THORITIES.

Sears, Roebuck and Co.
Seattle

Jan. 12, 1949.

Elliott & Lee, Attorneys at Law
Dexter Horton Bldg.
Seattle 1, Wash.

Attention: Mr. Elliott

Dear Mr. Elliott:

Subject: Keith Vallier, Bankrupt.

At the present time, there are approximate un-
paid balances on the following conditional sales
contracts carried on the books of our Ballard store:

Date Sold	Merchandise	Present Balance
8-25-47	Oil Heater	\$ 27.19
11- 1-47	Davenport and two chairs.....	135.62
11-12-47	Refrigerator	93.95

Yours very truly,

/s/ K. O. TRINTERUD,

Assistant Retail Credit

Supervisor.

KOT:lg

Copy received.

WM. McALLISTER,

By /s/ G. PETERS.

Jan. 13, 1949.

In the United States Court of Appeals for the
Ninth Circuit

No. 12461

In the Matter of
KEITH N. VALLIER, Whose Wife Is IRENE
VALLIER,

Bankrupt.

STIPULATION FOR PREPARATION AND
PRINTING OF SUPPLEMENTAL TRAN-
SCRIPT OF RECORD.

It is hereby stipulated and agreed by and between the appellant and the respondent in the above-entitled matter, that a supplemental record on appeal may be prepared, printed and filed herein, at the expense of the appellant, containing the following, to wit:

1. Schedule of B-2, Personal Property;
2. Statement of unpaid balances, attached to Memorandum of Authorities.

ELLIOTT & LEE,
Attorneys for Appellant.

/s/ WILLIAM J. McALLISTER,
Attorney for Respondent, and Attorney for Trustee.

In The United States Court of Appeals
For the Ninth Circuit

SEARS, ROEBUCK & Co., a corporation, *Appellant,*

— vs. —


WILLIAM J. McALLISTER, as trustee in the matter of
Keith N. Vallier, whose wife is Irene Helen Vallier,
bankrupt, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

FILED

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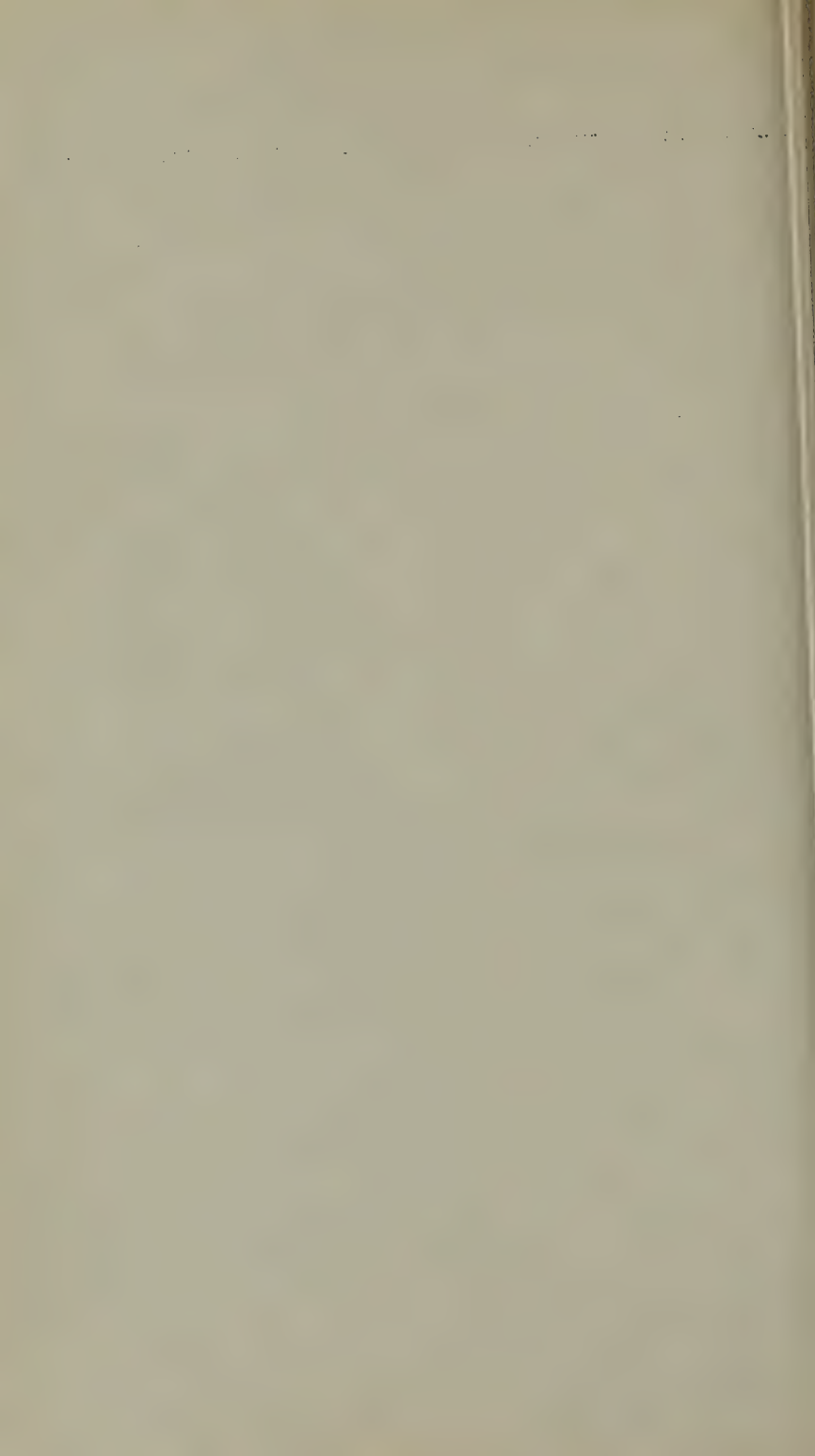
PAUL P. O'BRIEN, 
CLERK

HENRY ELLIOTT, and
NELSON T. LEE

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Attorneys for Appellant.

1082 Dexter Horton Building,
Seattle 4, Washington.



In The United States Court of Appeals
For the Ninth Circuit

SEARS, ROEBUCK & Co., a corporation, *Appellant,*
— vs. —

WILLIAM J. MCALLISTER, as trustee in the matter of
Keith N. Vallier, whose wife is Irene Helen Vallier,
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APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

HENRY ELLIOTT, and
NELSON T. LEE
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1082 Dexter Horton Building,
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**In The United States Court of Appeals
For the Ninth Circuit**

SEARS, ROEBUCK & Co., a corporation,
Appellant,

— vs. —

WILLIAM J. MCALLISTER, as trustee in
the matter of Keith N. Vallier, whose
wife is Irene Helen Vallier, bankrupt,
Appellee.

No. 12461

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

**QUESTION AT ISSUE AND JURISDICTION OF THE
COURT**

This appeal is from an order of the District Court for the Western District of Washington, Northern Division, entered December 13, 1949 (R. 24-6) in a bankruptcy proceeding. The jurisdiction of the District Court rests on the provisions of Chapter 1, Section 1(10) of the United States Code, 1946 Edition, providing that courts of bankruptcy include District Courts of the United States, and the jurisdiction of the United States Court of Appeals for the Ninth Circuit rests upon the provisions of Chapter 4, Section 47(a) of the same code vesting the Circuit Court of Appeals of the United States with appellate jurisdiction over proceedings, either interlocutory or final, from courts of bankruptcy.

The issue raised by this appeal is:

Did the court of bankruptcy err in attempting to deny the vendor's title to property set apart to the bankrupt as exempt under state law?

STATEMENT OF THE CASE

Keith N. Vallier, whose wife is Irene Helen Vallier, was adjudicated a voluntary bankrupt on the 19th day of October, 1948.

Prior thereto, he had purchased under conditional sales contracts from the vendor, Sears, Roebuck and Co. (hereinafter referred to as Sears), household goods and furnishings as follows:

<i>Date</i>	<i>Merchandise</i>	<i>Price</i>	<i>Carrying Charge</i>
Aug. 25, 1941,	Oil Heater.....	\$ 92.65	\$ 6.00
Oct. 31, 1947,	One davenport, two chairs.....	314.02	23.00
Nov. 12, 1947,	One Coldspot refrigerator.....	195.65	15.00
			(R. 13)

Each contract of purchase contained the following clause:

“Until full payment is made, I agree that title to and right of possession of the merchandise shall remain in you,”

signed by the vendee (R. 10).

The bankrupt claimed as exempt under the provisions of the state statute all real and personal property set forth and described in his schedules. The trustee, appellee here, on November 6, 1948, “set apart to be retained by the bankrupt aforesaid as his own property,” the following:

Estimated Value

Property claimed to be exempt by State laws, with reference to the statute creating the exemption:

1. Personal Property:

(a) Household Goods and equipment Equity interest only Rem. Rev. Stat., Sec. 563. Located at 3227 21st Avenue West, Seattle, Wash.	\$250.00
(b) Wearing Apparel - Rem. Rev. Stat., Sec. 563	250.00

(R. 3)

On April 29, 1949, the Referee in Bankruptcy filed his order approving the Trustee's Report on Exemptions, expressly holding, (1) "The Bankrupt's claim to exemptions is hereby allowed accordingly" and (2) "The property * * * is hereby set apart to the bankrupt as exempt and ordered delivered to said bankrupt forthwith" (R. 4).

On December 19, 1948, the Referee, pursuant to a petition filed by the Trustee on December 7, 1948, issued an order directed to Sears to appear and show cause

"why title * * * has not fully vested in the estate." and

"why the estate shall not be entitled to receive all monies unpaid on the purchase price from the bankrupt herein." (Petition R. 56; Order, R. 7-8)

In response to this order to show cause, Sears appeared and set up the conditional character of the sales of this merchandise to the bankrupt, that title was at all times reserved in Sears, that the bankrupt

had claimed and had been allowed the property as exempt, and that the property was then and had at all times been in the possession of and used by the bankrupt, and that title thereto had never vested in the bankrupt estate (R. 9-11).

On April 28, 1949, the Referee filed his Memorandum Opinion holding that Sears, having failed to file said conditional sales contracts, as provided by Section 3790, Remington's Revised Statutes of Washington (Laws of 1937, Chapter 196, Sec. 1):

"The vendor's interest * * * passed to, and is now vested in the Trustee in bankruptcy, and he therefore is entitled to collect and receive * * * the balance of payments owing on the contracts."
(R. 14)

On May 13, 1949, the Referee filed his order holding:

"That absolute title to said personal property has vested in the estate herein and is subject to sale and disposal under order of the court herein by the Trustee in bankruptcy," and

"that the estate herein and the Trustee in bankruptcy is entitled to receive from the bankrupt herein the balance due on the purchase price of said personal property * * *." (R. 15-16)

Sears on May 23, 1949, filed its petition in the District Court (Court of Bankruptcy) for review of said order of the Referee (R. 17-20). The District Judge, after several hearings involving discussions of counsel and the submission of briefs and hearing the testimony of the appellee, Trustee in Bankruptcy (R. 32-55), on December 13, 1949, entered his order sustaining the order of the referee:

"in all particulars." (R. 24-26)

ARGUMENT

The appellant bases its appeal squarely upon the following proposition:

Under the law and facts of this case the property in question was held to be exempt to the bankrupt under state law and therefore title to the property in question never vested in the Trustee in Bankruptcy. Therefore the Referee and the District Court were both without jurisdiction to enter the orders in question.

This basic proposition rests squarely upon the following rules of law:

1. Trustee does not take title to exempt property.

“The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or of the original petition proposing an arrangement or plan under this title, *except* insofar as it is to *property* which is *held to be exempt*.”

U. S. Code, 1946 Edition, Title 11, Bankruptcy, Sec. 110.

“This title shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile.”

U. S. Code, 1946 Edition, Title 11, Bankruptcy, Sec. 24.

(Italics in this brief are appellant's unless otherwise indicated.)

2. Title to property exempted by state law remains in the bankrupt, and must be adjudicated in state courts.

“Title to the property of a bankrupt exempted by state laws remains in the bankrupts, and does not pass to the trustee; and controversies involving *claims upon exempt property must be adjudicated in the state courts. Lockwood v. Exchange Bank*, 190 U.S. 294, 23 S. Ct. 751.”

Van Slyke v. Bumgarner, 177 Wash. 326, 329, 31 P.(2d) 1014.

“State laws control matters of exemption in bankruptcy cases in so far as the right to, and the nature and amount of, an exemption under such laws are concerned. The particular laws which are controlling are those of the state of the bankrupt’s residence or domicile, in force at the time of the filing of the petition, as construed by the highest court of the state.”

8 C.J.S., 1372-3, Sec. 494, Bankruptcy.

“It has very generally been held that, in bankruptcy proceedings, the only question for the court to determine is whether, as against creditors, the bankrupt’s property is exempt. Whether the property is subject to liens or judgments is not the concern of that court, and where such special claims are made, the state court is the proper forum in which to proceed for their enforcement. *In re Vonhee*, 238 Fed. 422, 7 C.J. 363, lays down the rule as follows:

“‘A court of bankruptcy has no jurisdiction to determine the existence or validity of a lien claimed by a creditor upon exempt property, or to enforce against exempt property the rights of creditors whose obligations or evidence of indebtedness contain a waiver of exemption, but

the rights of creditors to subject the same to their debts must be determined in the state courts.'

"To the same effect see the following cases: *In re Grimes*, 96 Fed. 529; *In re Jackson*, 116 Fed. 46; *Lockwood v. Exchange Bank*, 190 U.S. 294; *In re Sydel*, 118 Fed. 407; *McBride v. Gibbs*, 148 Ga. 380, 96 S.E. 1004; *Leslie Paper Co. v. Wheeler*, 23 N.D. 477, 137 N.W. 412, 42 L.R.A. (N.S.) 292, and note."

Lyon v. Herboth, 133 Wash. 15, 20-21, 233 Pac. 24.

3. In Washington conditional sales vendor holds title— is not a secured creditor.

"We have consistently held that, under the statutes of this state no title whatever passes under a conditional sales contract of personal property, and that the relation of debtor and creditor is not created. In *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817, L.R.A. (N.S.) 71, it was said that:

" 'It seems inconceivable that the absolute title remains in the seller and at the same time the purchase price be an enforceable debt obligation against the purchaser.'

"And in the following cases we have stated and reiterated that one who takes property under a conditional bill of sale is *not* the owner, and has *no* element of title; *Stewart & Holmes Drug Co. v. Reed*, 74 Wash. 401, 133 Pac. 577; *Norman v. Meeker*, 91 Wash. 534, 158 Pac. 78, Ann. Cas. 19170 462; *Peterson v. Chess*, 92 Wash. 682, 159 Pac. 894; *Barbour v. Hodge*, 99 Wash. 578, 170 Pac. 115.

"We have, therefore, aligned ourselves against

the decisions of those jurisdictions holding that the title is merely reserved as security, or that the vendee has a qualified property in the title."

Holt Manufacturing Co. v. Jaussaud, 132 Wash. 667, 674, 233 Pac. 35.

"State laws control matters of exemption in bankruptcy cases."

8 C.J.S. 1372, Sec. 493.

See also *In re Miller*, 74 F.(2d) 86; *In re Potter*, 4 F.(2d) 807; *Brown v. Home Life Ins. Co. of New York*, 3 F.(2d) 661; *Ralph v. Cox*, 1 F.(2d) 435; *In re Shepardson*, 28 F.(2d) 353.

4. Bankruptcy court has no jurisdiction to set aside lawful liens against exempt property under state law.

"On a claim of exemption the only question which concerns the court of bankruptcy is whether the debtor is entitled to his exemption as against general creditors; and, if such is the case, the claim cannot be denied because there are some creditors as against whom the claim of exemption could not be sustained."

8 C.J.S. 1378, Sec. 502, Bankruptcy.

See also *In re Vonhee* (D.C. Wash.) 238 Fed. 442; *Lyon v. Herboth*, 133 Wash. 15, 233 Pac. 24.

"A court of bankruptcy has no jurisdiction or authority over the exempt property, except to set it aside to the bankrupt for his use and turn it over to him or to some one duly appointed and constituted to receive it. Such property constitutes no part of the assets of the estate in bankruptcy; and the bankruptcy court has no power to administer it, beyond determining the exemption and setting the property apart. Further-

more, the bankruptcy court may not diminish exempt property by the payment therefrom of costs and expenses. The foregoing rules apply to property exempt under state laws."

8 C.J.S. 1384, Sec. 505, Bankruptcy.

See also *Hukill-Hunter Co. v. Oliver* (C.C.A. Pa.) 43 F.(2d) 100; *Birmingham Finance Co. v. Chisholm* (C.C.A. Ala.) 284 Fed. 840; *In re Duning* (D.C. Pa.) 296 Fed. 243; *Schwanz v. Farmers Co-op. Co. of Lorimor* (Iowa) 214 N.W. 491, 55 A.L.R. 644.

"The trustee has no authority or control over exempt property beyond setting it apart. While he may be entitled to custody or possession for this purpose, his custody is for the bankrupt and does not amount to *custodia legis* rendering the property immune from seizure under the process of a creditor as to whose claim the exemption has been waived."

8 C.J.S. 1384, Sec. 505.

See also *In re Cunningham* (D.C. S.C.) 15 F.(2d) 700; *Clark v. Mirenbaum* (C.C.A. C.A.) 8 F.(2d) 451; *In re Trammell*, 5 F.(2d) 326, Cert. Den.; *Powell v. Anderson*, 46 S. Ct. 349, 270 U.S. 649, 70 L. ed. 780.

"The petitioner asserts that the property cannot be set apart to the respondent as exempt since her homestead declaration was not filed, as required by State Law, until after entry of the petition in bankruptcy.

"Section 70(a) originally provided that the trustee shall be vested, by operation of law, with the title of the bankrupt as of the date he was adjudged a bankrupt

“‘except in so far as it is to property which is exempt * * *’

“‘property which is held to be exempt * * *.’

“Section 6 of the Bankruptcy Act declares that the provisions of the Act shall not affect the allowance to bankrupts of the exemptions

“‘which are prescribed by the State laws in force at the time of the filing of the petition’

“in the state where the bankrupt has had his domicile. The trustee, as to all property in possession and under the control of the bankrupt at the date of bankruptcy, is deemed vested, as of that date, with all the rights and remedies of a creditor then holding a lien on the property by legal or equitable proceedings, whether or not such a creditor actually exists. An adjudication in bankruptcy is not the equivalent of a judicial sale, nor is the trustee given the rights of a purchaser at such a sale.

“The question thus arises whether the respondent’s right of homestead under Nevada law, secured by her filed declaration, prevails against the right and title of the trustee. The court below so held, and we think its judgment was right.

“1. We conclude that the new phraseology in the amendment of § 70 (a) does not alter the principles applicable to the exemption of homestead property in bankruptcy. On the face of the legislation the intent of Congress was merely to clarify the meaning of the section. We are referred to no legislative history indicating that the alteration was intended to work a change of substance. Under the amendment, as under the original provision, a homestead is exempt if, under the state law, it would be held to be exempt.”

145 A.L.R. 498, 499, *Myers v. Matley* (U.S.)
63 Sup. Ct. 780, 87 L. ed. 403-43.

“It is therefore of no concern to the general creditors what disposition a bankrupt makes of exempt property, and a mortgage or transfer thereof cannot be treated as a preference, since *in no event would the trustee be entitled to the property.*”

Baumbaugh v. Los Angeles Morris Plan Co.
(*In re Frank*) (C.C.A. 9) 3 F.(2d) 816.

See also *Gylling v. Kjergaard* (C.C.A. 8) 293 Fed. 676.

Baumbaugh v. Los Angeles Morris Plan Co. (In re Frank) *supra*, was cited and approved recently as follows:

“It is to be borne in mind that our Circuit Court of Appeals has held that the effect of the exemption of property under the state statutes, is that the property does not pass to the trustee and is ‘not subject to administration by the Bankruptcy Act’.”

In re Dudley (C.D.S.D. Calif. Judge Yankwich) 72 F. Supp. 943, 945. Affirmed on appeal (C.C.A. 9) 166 F.(2d) 1023.

5. A setting apart of real estate to a bankrupt as exempt by the Bankruptcy Court does not affect the right of the vendor to forfeit the Executory Contract for failure to pay the purchase price.

“That a vendee in possession of real property under an executory contract to purchase may claim a homestead therein is well settled in this state. *Desmond v. Shotwell*, 142 Wash. 187, 252 Pac. 692; *Perkins v. LaVerne*, 171 Wash. 240, 17 P.(2d) 857; *Hancock Mutual Life Ins. Co. v.*

Wagner, 174 Wash. 185, 24 P.(2d) 420, 27 P. (2d) 1118. The right of homestead, however, does not exist after the right of possession is lost, and the right of possession ceases when the contract is lawfully terminated.

“The homestead right is lost with the loss of the rights of the purchaser under his contract for the purchase of land. It may be lost by a forfeiture of the vendee’s rights under the contract of purchase and ejectment for failure to make the several payments stipulated in the agreement, or where the contract not only has not been complied with, but has been abandoned because of inability to pay the purchase money.”

29 C.J. 845, Sec. 153 (e).

See also, *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429; *Alexander v. Jackson*, 3 Cal. Unrep. Cas. 344, 25 Pac. 415; *Helgebye v. Dammen*, 13 N. Dak. 167, 100 N.W. 245.

Applying these established legal propositions it follows that the bankruptcy court committed the following errors:

SPECIFICATION OF ERRORS

1. In holding that under the facts the property sold by Sears was not exempt to the bankrupt.

(a) Under the Washington statute the bankrupt was entitled to an exemption in household goods and furniture to the value of \$750.00.

Rem. Rev. Stat., Vol. 2, Wash., Section 563, Laws of Wash. 1886 p. 96 gave the bankrupt the following exemptions:

Subdivision 1. “All wearing apparel of every person and family.”

Subdivision 3. In addition to specified bedding "other household goods and utensils and furniture not exceeding \$500.00 coin in value."

Subdivision 4. Specified animals and fowls or if he does not possess or desire to retain such he may "select from his property and retain other property not to exceed \$250.00 coin in value." * * *.

* * * "The purpose of the exemption statutes has long been conceded to be of the beneficent public policy of preventing indigence and encouraging thrift. The broadest interpretation consonant with that policy and with reason and justice should be given such statutes to effectuate their object."

Lemagie v. Acme Stamp Works, 98 Wash. 34, 41, 167 Pac. 60.

See also *Hills v. Joseph*, 229 Fed. 865; *In re Seanson*, 213 Fed. 353; *In re Crook*, 219 Fed. 979; *In re McFarland*, 49 F.(2d) 342 (C.C.A. 9).

"We have consistently held that 'homestead and exemption laws are favored in the law and are to be liberally construed' *State ex rel. White v. Douglas*, 6 Wn.(2d) 356, 107 P.(2d) 593."

In re Poli's Estate, 27 Wn.(2d) 670, 179 P.(2d) 704.

Rem. Rev. Stat. §563, expressly declares:

"The following property shall be exempt from execution and attachment * * * (omitting 14 subdivisions of exempt property enumerated in this section)."

(b) The Court's valuation of the property was unsupported by evidence.

After hearing the testimony of the Trustee (the

only evidence taken by either the Referee or the District Judge) the court indicated his findings of the facts as follows:

“My recollection is that there is about \$421.00 due on just a few items. The reasonable *inference* is that the goods are worth sufficiently above \$421.00, or sufficiently above \$406.00, to make it worth while for the bankrupt to pay that balance. The bankrupt is anxious to pay it. *In the absence of rather convincing evidence*, I must conclude that the property itself is worth more than the amount due. The reasonable *inference* is that the *bankrupt had* the general items of furniture, *including dishes, pots and pans, silverware, and the various other items that allow his family to exist*, and I therefore must conclude that the valuation of all the household goods and furniture, exclusive of the beds and beddings at the time that he went into bankruptcy, and at the present time, exceeded \$500.00—reasonably exceeded \$500.00. To say otherwise would be to say that all the various items had a value of substantially less than \$100.00, other than the items under contract, and I doubt that it is reasonable to infer that the other items, although rather numerous in number, would be of such trivial worth, and yet the bankrupt would be supplementing such trivial items with a few items of substantial value.

“It would seem to me that I would not be justified in finding that the value was less than substantially over \$500.00. The record also would indicate that, because it shows that the equity was of a certain amount, and then there was a balance of some \$400.00. So that equity in all of the goods owned by him, and the value of

these goods actually owned by him, plus the balance, again exceeds \$500.00." (R. 38-9)

The answer to the court is three-fold:

First, he could only *infer* value by *assuming* that the bankrupt had other household property and that he was claiming such other property exempt. The testimony was all to the contrary.

On being questioned by the court the trustee testified:

"Q Have you viewed the premises?

A *No*, I have not.

Q Do you know whether there is any silverware?

A Yes, there is, *I think*, some silverware. As I recall, when I talked to Mr. Dailey, he *told me* that they bought it from an Army Surplus Store, as I recall.

Q Do they have any pots and pans?

A I assume that they do. *I don't know*.

Q How did you arrive at the valuation of \$250.00 as the equity?

A They have paid—the total amount of the property which has been listed by them as having, household goods and so forth, which they bought on conditional sales contract, *they paid that amount*.

Q I realize that, but that merchandise that was bought on conditional contract consisted of an oil heater, one davenport, two chairs, and one Coldspot refrigerator. You do not mean to say that you think that a man and wife are living with nothing but an oil heater and one davenport and two chairs, and one Coldspot refrigerator do you?

A Well, *they have the right*, as I took it, *to select whatever they wanted.* * * *

Q Do you know how many beds they have?

A No, I do not.

Q Or how much bedding? * * * I have not been actually in a position to state, because this thing has been pending so long here. * * *

Q Do you know whether they have had rugs and carpets, a camera, dishes and glassware, and pots and pans?

A I cannot say.

Q You are unable to say?

A That is correct.

Q All right. Now, have you seen these particular items that you have testified about?

A No, I have not seen any items that the people have. * * *."

Questions by MR. LEE:

"Q Are these items, Mr. McAllister, that are set out in the inventory—pardon me—which are in the return that was made to the order to show cause, the oil heater, the davenport, the two chairs, the Coldspot refrigerator, and the radio and the clothing—the possession of those items was allowed to remain in Mr. (5) Vallier, is that right?

A That is right.

Q And to the best of your knowledge, he still has those?

A Yes, sir.

Q And those items never were taken into your possession?

A No, they were not." (R. 33-36)

This testimony shows there was not even a pretense of *appraisement* or valuation. The court as well as the trustee only *guessed* as to valuation — the trustee guessed \$250.00 because he understood the bankrupt had paid that amount on the conditional sales contracts—the court guessed \$500.00 because the total original purchase price exceeded that amount slightly.

Taking the purchase price paid for household goods several years previously as fixing their value at the date of adjudication was, to say the least, quite unrealistic. Perhaps the court had never had experience in selling second-hand furniture.

Secondly, the court ignored the fact that the bankrupt was, under the applicable statute, entitled to an exemption of \$750.00 in value.

Thirdly, it would have made no difference if there had been evidence of the bankrupt having other household goods because the bankrupt *did not claim* such other goods. Under the law a bankrupt can *select* from his property that which he wishes to claim as exempt. The question here is, did the value of the household goods selected (the Sears' merchandise) exceed the sum of \$750.00. We submit that neither the trustee, the referee, nor the court had any evidence upon which to base any such valuation.

(c) Likewise there was no segregation of the so-called equity in this property.

The designation of "equity" by the bankrupt in describing the property claimed as exempt was purely descriptive. The word did not represent value. It signified the character of his title. Equity does not

signify the amount paid. It is qualitative rather than quantitative.

It represented a subsisting interest. Bear in mind the contract was in good standing. It entitled the bankrupt to possess, use and enjoy the property. Until there was a breach and a forfeiture the bankrupt had a right to retain the property.

While the bankruptcy court had a right to appraise and set apart the bankrupt's exempt property (*In re Lynch*, 101 Fed. 579) and to order a sale, where necessary to effectuate the setting apart (*In re Osborn*, 104 Fed. 780), it is never done unless:

“the exempt property is *not segregated* or *capable* of being readily set apart from other property, and it might be said, is *indivisible* except through some appropriate process of the court.”

Bank of Nez Perce v. Pindel (C.C.A. 9) 197 Fed. 917.

In the instant case, these articles of household goods could easily have been segregated or divided had the exemption value rendered same necessary. On the contrary, it was recognized that the bankrupt was entitled to their possession, use and enjoyment, and accordingly they were left in his possession at all times. Since the value was clearly less than \$750.00 there was no necessity to segregate or sell.

The respective rights of the bankrupt and his vendor, both as to the payment of the balance of the purchase price or any attempt at forfeiture in the event of a future default in payment, were not matters of concern to the bankruptcy court, but should have been

left to decision by the state courts under applicable state laws.

That a segregation or divison of the property was not indicated is made clear by the action of the trustee and referee in setting the entire Sears' merchandise apart to the bankrupt, leaving it in his *sole* possession and use *to this day*.

2. The bankruptcy court exceeded its jurisdiction.

The bankruptcy court, overlooking fundamental principles and rules, then undertook to adjudicate the title as between the bankrupt and his vendor.

Instead of limiting its inquiry to the *appraisement* of the property claimed as exempt, and allowing an exemption within the value fixed by the statute, the bankruptcy court, *assuming* a value beyond the statutory limit, orders all of the property set apart to the bankrupt and seeks to impound into the bankrupt estate the amount unpaid on the purchase price.

This was beyond the jurisdiction of the court and violative of all authorities, both federal and state, cited under sub-divisions 2 and 4 above (pp. 6, 8).

The referee's order recited that

"the sale by the said respondent to the said bankrupt was and is an absolute sale and that the absolute title to said property has vested in the estate herein." (R. 16)

No court of bankruptcy has ever been given the power to *adjudicate* title to *exempt property*. The holding of the referee "sustained in all particulars" by the order of the bankruptcy court (R. 25) was wholly void. It is based upon a misconstruction of the

law. Remington's Revised Statutes of Washington, Section 3790, Laws of 1937, Chapter 196, Section 1, reading as follows:

"That all conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to all *bona fide* purchasers, pledgees, mortgagees, encumbrancers and subsequent creditors, whether or not such creditors have or claim a lien upon such property, unless within ten days after the taking of possession by the vendee, a memorandum of such sale, stating its terms and conditions, including the rate of interest and the purchase price exclusive of interest, insurance and all other charges, and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides." * * *

does not make the sale absolute as *between the original parties*.

"We have consistently held that, under the statutes of this state, no title whatever passes under a conditional sales contract of personal property, and that the relation of debtor and creditor is not created. In *Winton Motor Carriage Co. v. Broadway Automobile Co.*, 65 Wash. 650, 118 Pac. 817, 37 L.R.A. (N.S.) 71, it was said:

" 'It seems inconceivable that the absolute title remains in the seller and at the same time the purchase price be an enforceable debt obligation against the purchaser.'

"And in the following cases we have stated and reiterated that one who takes property under a conditional bill of sale is not the owner,

and has no element of title: *Stewart & Holmes Drug Co. v. Reed*, 74 Wash. 401, 133 Pac. 577; *Norman v. Meeker*, 91 Wash. 534, 158 Pac. 78, Ann. Cas. 1917D 462; *Peterson v. Chess*, 92 Wash. 682, 159 Pac. 894; *Barbour v. Hodge*, 99 Wash. 578, 170 Pac. 115.

“We have, therefore, aligned ourselves against the decisions of those jurisdictions holding that the title is merely reserved as security, or that the vendee has a qualified property in the title.”

Holt Manufacturing Co. v. Jaussard, 132 Wash. 667, 674, 233 Pac. 35.

Both the referee and the court erred in holding that all Sears had was a “security interest.” Sears had title, was not a creditor and has never claimed to be a creditor of the bankrupt. In fact, so long as the bankrupt continued to pay the contract price he was not a debtor and Sears was not a creditor.

Hafer v. Spaeth, 22 Wn.(2d) 378, 156 P. (2d) 408.

3. The bankruptcy court is without power to impound future earnings of the bankrupt.

The order of the referee, sustained in all particulars by the court, further ordered that

“the trustee in bankruptcy is entitled to receive from the bankrupt herein the balance due on the purchase price of said personal property.” (R. 16, 25)

“The wages earned after the adjudication became the property of the bankrupt clear of the claims of all creditors.”

Local Loan Co. v. Hunt, 93 A.L.R. 195, 200, 292 U.S. 234, 78 L. ed. 1230, 54 S. Ct. 695.

“The date of the filing of the bankruptcy petition is the point of time as of which the right to exemptions is to be determined.”

8 C.J.S. 1378, Bankruptcy, Sec. 502.

See also *White v. Stump* (Idaho) 45 S. Ct. 103, 266 U.S. 310, 69 L. ed. 301; *In re Trammell* (D.C. Ga.) 5 F.(2d) 326; *Clark v. Nirenbaum*, 8 F.(2d) 451.

Under Washington law a contract of conditional sale not filed is good as between the parties.

See *In re Gunning*, 39 F. Supp. 706, Suppl. Op. 38 F. Supp. 500, affirmed 124 F.(2d) 7.

With one hand to extend the right of possession, use and enjoyment of the property as exempt, and with the other hand to demand that the bankrupt pay the unpaid purchase price into the bankrupt estate, would be contrary to the very spirit and purpose of the exemption.

“Purpose; public policy. The exemption laws are founded on public policy. Some authorities regard the allowance of the exemption as being for the benefit of the debtor, while others regard it as in the nature of a police regulation primarily for the benefit of the community; in any event, the purpose underlying exemption legislation is the securing to the unfortunate debtor of the means to support himself and his family, the protection of the family being the main consideration.”

35 C.J.S. 8, Exemptions.

Furthermore, to take such action in the absence of and without giving to the bankrupt an opportunity to be heard, would seem to be wholly unwarranted.

4. The orders in question deprive the vendor of his contract rights.

It is obvious that for the bankruptcy court to order the bankrupt to pay the unpaid balance into the bankrupt estate not only created a burden on the bankrupt but was *intended* to prevent Sears from collecting the balance of the purchase price of its merchandise.

However, it is too well established for argument that any dispute as to respective rights of the vendor and the bankrupt are matters solely within the jurisdiction of the state courts. See *Lockwood v. Exchange Bank*, 190 U.S. 294, 23 S. Ct. 751; *In re Vonhee*, 238 Fed. 422; *Van Slyke v. Bumgarner*, 177 Wash. 326, 329, 31 P.(2d) 1014.

Necessity and Purpose of This Appeal

The amount involved in this action would not seem to warrant the time or expense involved in this appeal if it were not for the evident purpose of the referee and the court to set a precedent intended to *force* vendors under conditional sales contracts to file such contracts in order to retain the vendor's contract interest where the property sold is within the exemptions to which the vendee bankrupt is entitled under state law and the property has been set apart to the bankrupt as exempt.

Such action is entitled to neither the sanction of law nor of good morals.

The appellant is entitled to a reversal of the order appealed from and a dismissal of the action.

Respectfully submitted,

HENRY ELLIOTT, and

NELSON T. LEE

as ELLIOTT & LEE,

Attorneys for Appellant.

No. 12465

United States
Court of Appeals
for the Ninth Circuit.

JOHN WALDON,

Appellant,

vs.

E. B. SWOPE, Warden, United States Peniten-
tiary, Alcatraz, California,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

APR -5 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

JOHN WALDON,

#620 Alcatraz, California

In Propria Persona.

FRANK J. HENNESSY,

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San Francisco, California,

Attorney for Respondent and Appellee.

In the Southern Division of the United States
District Court for the Northern District of
California

29233E

In the Matter of

The Application of John Waldon, for a Writ of
Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Judge of the United States Dis-
trict Court for the Northern District of Cali-
fornia, Southern Division:

The petition of John Waldon respectfully shows:

I.

That he is now imprisoned and restrained of his
liberty by E. B. Swope, Warden of the United
States Penitentiary, Alcatraz Island, California.

II.

That the cause or pretense of such imprisonment
and restraint according to the best knowledge and
belief of your petitioner, is by virtue of two judg-
ments, commitments and sentences, copies of which
are hereto annexed.

III.

That annexed hereto, marked and entered herein
as petitioner's Exhibits A, B, C, D, E, and F, re-
spectively, are the documents hereinafter described
to which reference is herein made, the contents of

each of which said exhibits and the allegations therein contained are hereby adopted, incorporated herein and made a part of this motion as though fully copied and set forth at this point word for word, which said exhibits consist of the following documents as lettered:

A. "Exhibit A," is a certified printed Transcript of Record filed in this case, April 25, 1940, which said Record contains, the indictment, judgment and sentence and other evidence pertinent to this petition.

B. "Exhibit B," is a certified copy of a letter from D. H. Reed, clerk, of the District Court of the United States, for the Eastern District of Illinois, relating to the illegally collected fines on Counts 6 and 7.

C. "Exhibit C," is a certified copy of the Order, modifying sentence entered on September 29, 1944.

D. "Exhibit D," is a certified copy of the Order, modifying sentence entered on May 12th, 1949.

E. "Exhibit E," is a certified copy of the indictment, judgment and commitment, by virtue of which defendant was sentenced to serve one-day in the county jail.

F. "Exhibit F," is an order, per authority of the Director, Bureau of Prisons, aggregating the one day to the original sentence, permitting it to be served in the penitentiary.

IV.

Facts of the Case

On September 6, 1939, petitioner and two others were indicted in the District Court of the United States for the Eastern District of Illinois in seven counts charging offenses against the postal service (R 2-7). As indicated by the indictment, the charges grew out of an alleged attempt by petitioner and two others to rob a United States mail car. The first three (3) counts (R 2-4) charges the defendants with destroying certain mail matter, in violation of Section 194 of the Criminal Code (18 U.S.C. 317); the fourth counts alleged an assault with intent to rob mail clerk Guy O'Hern of the mail; the fifth count alleged an assault with intent to rob mail clerk Carl C. Boothman of the mail; the sixth count alleged an assault with intent to rob the said mail clerk O'Hern, and in attempting to effect such robbery did wound said mail clerk by the use of a dangerous weapon; the seventh count alleged an assault with intent to rob the said mail clerk Boothman, and in attempting to effect such robbery, did jeopardize the life of said mail clerk by the use of a dangerous weapon. Counts 4, 5, 6 and 7 were in violation of Section 197 of the Criminal Code (18 U.S.C. 320) (R 4-7).

From the filing of the indictment through to the denial of the motion in arrest of judgment, the defendant questioned at every opportunity the sufficiency of the evidence (R-18, 21). 26.

At the commencement of the trial defendant challenged the petit jury, on the ground that women had been improperly excluded from the jury panel. The challenge was overruled and thereafter such ruling was assigned as error. (Assignment of Error, Assignment 1, R. 32.)

Petitioner's two codefendants, on pleas of guilty were each sentenced to twenty-five (25) years imprisonment.

A trial was had as to petitioner and the jury returned a verdict of guilty on all counts. Petitioner was sentenced to imprisonment for the period of:

Five years from this date on each of Counts 1, 2, 3, 4 and 5—said sentences to run and be served consecutively with each other.

Twenty-five (25) years and ten thousand (\$10,000.00.) dollars fine on the 6th count of said Indictment.

Twenty-five (25) years and ten thousand (\$10,000.00) fine on the 7th Count of said Indictment—sentence on Counts 6 and 7 to run consecutively with each other but concurrently with sentence imposed on Counts 1, 2, 3, 4, 5 of said Indictment, and that said defendant stand committed to said Institution until payment of said fine, or until said defendant is otherwise discharged as provided by law. (R 27-28.)

No fine is provided for by Section 197 of the Criminal Code (18 U.S.C. 320).

On appeal to the Circuit Court of Appeals for

the Seventh Circuit the judgment of the District Court was affirmed. Counsel for appellant assigned five (5) errors, upon which reversal was sought. (R 32.) Only one of these assignments, however, was urged at the hearing before the Circuit Court of Appeals, because Counsel stated in his opening brief:

“The sole error relied on arises out of the admission of highly prejudicial evidence at the trial, over the defendant’s objection; namely, the defendant’s prior conviction for a misdeameanor.” Judgment affirmed (114 F. 2d 982), certiorari denied (312 U.S. 681).

On August 13, 1941, the sum of \$403.50 was realized from the sale of certain items of defendant’s personal property, taken without warrant from his home in Chicago in August, 1939, and sold by the United States Marshal at Danville, Illinois, to satisfy the improperly assessed judgment of \$20,000.00. This amount together with \$150.00 in cash was turned over to the Clerk of the Court. (“Exhibit B.”) On September 3, 1941, and again on September 27, 1941, the Clerk of the District Court forwarded by Trust Fund Voucher to the Division of Finance at Washington, D. C., an amount, including additional deposits on proceeds of sale totaling \$833.50 (“Exhibit B”).

On September 5, 1944, almost four years after the judgment of the Circuit Court of Appeals was entered, petitioner mistakenly filed in that Court

a "Petition for Rehearing or for Leave to Proceed on motion in the Trial Court for Resentence." In that document petitioner contended that only one offense was charged in the seven counts of the Indictment, and that the evidence was insufficient to support his conviction under Counts 1, 2 and 3. The Circuit Court of Appeals filed this petition.

On September 29, 1944, during the pendency of this proceeding in the Circuit Court of Appeals, the District Court, by whom the sentence was originally imposed, upon its own motion, amended the sentence by eliminating the assessment of fines on counts six (6) and seven (7), but leaving in force the sentence of imprisonment, entering the order *nunc pro tunc* as of February 5, 1940, the date of the original judgment. This order was entered in the absence of petitioner and his counsel and without notice to them.

On October 25, 1944, in a two judge, *per curiam* opinion, the Circuit Court of Appeals denied the petition on its merits. This opinion has never been officially reported.

Defendant then presented a petition for writ of certiorari. Counsel for the Government filed a memorandum in opposition. In this connection we respectfully call this Court's attention to the fact that Government Counsel, which included the present Associate Justice of the Supreme Court, Tom Clark, pointed out in their memorandum in opposition:

“The petition was filed approximately four years after the judgment of the Circuit Court of Appeals was entered. . . . In these circumstances it is settled that the Circuit Court of Appeals lacked power to entertain the petitioner’s application as a petition for rehearing, for ‘the case had passed beyond the control of the court’ (Citing cases), continuing: To secure a judicial determination of the propriety of his sentences, petitioner may still file a motion for resentence in the District Court.” Certiorari denied, 65 Sup. Ct. 683, rehearing denied 65 Sup. Ct. 910.

On May 2, 1944, when petitioner called the attention of the Judge of the Trial Court to the unlawful judgment, he replied by letter:

“I am wholly without jurisdiction in your case. Your remedies lie with the parole authorities and with the executive authorities, the latter of whom alone can extend executive clemency.”

Although later, by letter of May 16, 1947, he stated:

“Any matter properly presented in open court will receive attention.”

On September 24, 1948, petitioner filed a motion to vacate the void judgment of conviction under Section 2255, Title 28, U.S.C. The government moved to dismiss said motion.

Petitioner contended in that motion that the Court should rule that this cause comes within the express prohibitions of the phrase in section 2255, “that

the remedy by motion is inadequate or ineffective to test the legality of his detention," so that he may be permitted to apply for a writ of habeas corpus, forthwith. Petitioner believes that due to the particular factual elements in this case, i.e., the imposition of the illegal fine, its partial collection in the amount of \$833.50, the modification of the sentence in his absence, without further disposition of the unauthorized sanction, other than that the government still holds it, would seem to bring it expressly within the prohibition embraced in the words "inadequate or ineffective."

Specifically the questions submitted in that motion were:

1. Under the Fifth and Sixth Amendments to the Constitution and under the inherent power of the United States Supreme Court to direct the administration of justice in the Federal Courts was it error, rendering invalid the judgment of conviction, for the court to exclude all women from the petit jury panel when such exclusion was arbitrary and without cause? Particularly after timely objection was made?

2 (a). Whether the total absence of any evidence to support conviction as to Counts 1, 2 and 3 vitiated jurisdiction of the court to impose sentence on such counts?

(b) Whether the court having imposed sentences on Counts 1, 2 and 3 had authority to cumulate such sentences?

3. Whether it was a violation of the double jeopardy provision of the Fifth Amendment for the Court to construe Section 197 of the Criminal Code as authorizing the imposition of separate, consecutive sentences under Counts 4 and 5 and of separate, consecutive sentences under Counts 6 and 7, and to impose such sentences?

4. Whether under the due process of law clause and the double jeopardy provision of the Fifth Amendment to the Constitution, a sentence imposing both imprisonment and fine, where the statute authorized imprisonment only, was void?

5. Where the Court having authority to impose imprisonment only imposed both imprisonment and fine, does the partial payment of the fine by distraint of personal property, violate the double jeopardy provision and due process clause of the Fifth Amendment to the Constitution?

6. Whether a District Court, having sentenced the petitioner in a criminal proceeding to imprisonment and fine, under a statute permitting the imposition of imprisonment only, may amend the sentence in the absence of defendant and without notice to him, after partial payment of the fine by distraint of personal property?

7. Whether the form of the sentence is so vague and uncertain that any part thereof in excess of twenty-five (25) years is incapable of execution?

The Honorable Judge Lindley made tacit confirmation of petitioner's contentions that for purposes of sentence Counts 1, 2 and 3 would support only one valid sentence. He further made tacit confirmation of the contention that Count four (4) merged with Count six (6) and Count five (5) merged with Count seven (7). He made express confirmation of the contention that as a Matter of Law, petitioner, could not properly be sentenced to consecutive sentences on Counts six (6) and seven (7).

Judge Lindley found that at this late date, petitioner waived any right to object to the arbitrary elimination of women from the petit jury panel even where timely objection was made. Judge Lindley denied petitioner's contention, that the imposition and collection by distraint of the illegal fines, in addition to a definite term of imprisonment, subjected petitioner to double punishment, with the single bald statement, "Nor do I believe partial payment of a void fine entitles defendant to discharge from the valid part of his sentence."

Judge Lindley's "Findings of Fact and Conclusions of Law" are reported in 84 F. Supp. 449.

There are, therefore, two fundamental issues raised on this petition, the first of which is that the sentences on Counts six (6) and seven (7) are not authorized by the said statute and subject petitioner to double punishment.

A definite term of imprisonment and a \$20,000.00

fine was imposed on petitioner, where the statutory penalty provided for imprisonment only. \$833.50 of the illegally imposed fine was collected by distraint of personal property and covered into the United States Treasury. Several years later in the absence of petitioner and without notice to him, the Court vacated the illegally imposed fines without any reference to the money, which the government still retains. The question presented, is whether in these circumstances, the complete defect of such punishment, an invasion of petitioner's right to the Constitutional immunity from a second punishment for the same offense, is precluded by the due process of law clause and the double jeopardy provision of the Fifth Amendment.

The second of which issues is:

Under the Fifth and Sixth Amendments to the Constitution and under the inherent power of the United States Supreme Court to direct the administration of justice in the Federal Courts, was it error, rendering invalid the judgment of conviction, for the Court to exclude all women from the petit jury panel when such exclusion was arbitrary and without cause, particularly after time objection was made?

V.

That no previous application has been made for the writ below prayed.

VI.

The petitioner herein has as of July 1st, 1949, fully completed a sentence in excess of fifteen (15) years, taking into account deductions to which he was entitled (18 U.S.C.A. §§710, 713, 744h) and now and presently is being illegally and unlawfully restrained and deprived of his liberty in violation of the Statutory Laws, the constitutional provisions of the Constitution of the United States, and the Amendments thereto.

VII.

Wherefore, your petitioner prays, that this Honorable Court enter an Order sustaining said petition granting the Writ of Habeas Corpus and discharge the petitioner from further custody of respondent, and from further illegal restraint of his liberty, as law and justice require.

Respectfully submitted:

/s/ JOHN WALDON,
Petitioner.

Verification

State of California,
County of San Francisco—ss.

John F. Waldon, being duly sworn deposes and says: That he is the petitioner in the above-entitled cause; That he has read the foregoing petition for writ of habeas corpus, that he knows the contents

thereof to be true of his own knowledge except as to the matters therein stated of information and belief, and as to those matters he believes them to be true.

Subscribed and sworn to before me this 8th day of October, 1949.

[Seal] /s/ PAUL J. MADIGAN,
Associate Warden, United States Penitentiary, Alcatraz, California.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary, Alcatraz, California, Indicate that John Waldon Is a Citizen of the United States.

[Endorsed]: Filed Oct. 20, 1949.

“EXHIBIT A”

Placita.

1. Pleas in the District Court of the United States Within and for the Eastern District of Illinois, at a special term thereof, begun and held in the United States court room, in the City of Danville, in said district, before the Honorable Walter C. Lindley, judge of said court, on the first Monday of December, in the year of our Lord one thousand nine hundred and forty and of the Independence of the United States of America, the one hundred and sixty fourth year.

D. H. REED,

Clerk.

Criminal No. 15076

THE UNITED STATES OF AMERICA,

vs.

JOHN FRANK WALDON, alias JOHN LARRY RANKIN, alias JAMES BAKER, alias JAMES KELLY, alias JOHN BERCOVITZ, alias JIMMIE DIXON, alias GEORGE A. DIXON, alias J. ROGERS, alias CHARLES DARNELL, et al.

* * *

Mr. Reznik: If the Court please, I would like to have an opportunity to call the Marshal with a view of ascertaining whether women were excluded from this venire.

The Court: This jury was selected last summer. The next jury will have women on it.

Mr. Reznik: At this time I wish to make an objection to the venire * * * and move to challenge the array for the reason that there were no women on the jury.

The Court: The motion is overruled.

Thereupon, the plaintiff to maintain the issues on its part, introduced the following evidence, to wit:

(All witnesses were duly sworn.)

* * *

And now opening statements of respective counsel are heard and evidence on behalf of the United States is heard and concluded and at the close thereof comes the Defendant, by his attorney, and moves the Court to direct the Jury to return a verdict finding him "Not Guilty" and after due hearing, the Court being fully advised in the premises,

It Is Ordered by the Court that said Motion be and the same is hereby denied.

And now evidence on behalf of the Defendant is heard and concluded and at the close thereof comes again the said Defendant, by counsel, and renews his motion for the Court to direct the Jury to return a verdict finding him "Not Guilty" and after due hearing and arguments of respective counsel, the Court being fully advised in the premises,

It Is Ordered by the Court that said Motion be and the same is hereby denied and now after hear-

ing all of the evidence in the case, the arguments of respective counsel and the instructions of the Court, the Jury retire in charge of a sworn officer to consider their verdict and afterwards comes the said Jury into Open Court and for verdict say:

“We, the Jury, find the Defendant, John Franklin Waldon, Guilty in manner and form as charged in the Indictment in this case.”

And now comes the Defendant, by counsel, and moves the Court for a new trial, which motion, after due hearing, is by the Court overruled, to which ruling of the Court the said Defendant, by counsel, then and there excepts.

And now comes again the said Defendant, by counsel, and presents to the Court his motion in arrest of Judgment, which motion after due hearing is by the Court denied, and to which ruling of the Court the said Defendant, by counsel, then and there excepts.

[Endorsed]: Filed May 17, 1940.

“EXHIBIT B”

In the District Court of the United States
for the Eastern District of Illinois

Criminal No. 15076

THE UNITED STATES OF AMERICA

vs.

JOHN FRANK WALDON.

I, D. H. Reed, Clerk of the United States District Court for the Eastern District of Illinois, hereby certify that my Trust Fund Collection Account at Danville shows a deposit on July 29th, 1941, which was applied as part payment on John Waldon's fine in the sum of \$280.00. This amount was paid to the Post Office Department, Third Assistant Postmaster General, Division of Finance at Washington, D. C., on September 3rd, 1941, under my Trust Fund Voucher No. 51-D, Trust Fund Check No. 2193, Item 2.

I further certify my Trust Fund Collection Account at East St. Louis, Illinois, shows that an additional deposit was made on September 23rd, 1941, by William Ryan, U. S. Marshal, representing proceeds of sales under execution on personal property and applied as part payment on John Waldon's fine in the sum of \$553.50. This additional deposit of proceeds of sale was paid to the Post Office Department, Third Assistant Postmaster

General, Division of Finance, Washington, D. C., on September 27th, 1941, under my Trust Fund Voucher No. 66-E, Check No. 2206, Item No. 2. You will note that these two items of receipt and disbursement total \$883.50, which was applied as payment to satisfy in part, the Judgment of the United States District Court for the Eastern District of Illinois, which imposed a \$20,000.00 fine upon the said John Frank Waldon in the above-captioned cause.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Danville, Illinois, this 20th day of August, A.D. 1948.

[Seal] /s/ D. H. REED,
Clerk of the United States District Court for the
Eastern District of Illinois.

[Endorsed]: Filed Aug. 20, 1948.

"EXHIBIT F"

Department of Justice
United States Penitentiary
Leavenworth, Kansas

Date October 27, 1943.

Hon. Frank R. Collins,
Assistant U. S. Attorney,
Topeka, Kansas.

Dear Sir:

In re: John Frank Waldon
our # 56411-L.

The following is quoted from letter of October 18, 1943, received from your office:

"So far as this office is concerned, the detainer may now be removed. However, the U. S. Marshal will want to take him into custody upon his release to serve one day in jail, and you should perhaps advise the Marshal when the subject's sentence terminates."

Commitment in Case # 7236, District of Kansas, was forwarded to this office by the U. S. Marshal, Topeka, Kansas, per his letter of 9-22-1943. The sentence of one day, for the attempted escape, has been aggregated with the original sentence of 50 years, changing the sentence to 50 years and one day, per authority of the Director, Bureau of Prisons, in his letter of October 9, 1943.

By the authority contained in the above-quoted letter the detainer has this date been withdrawn from our records.

Respectfully,

/s/ CARL F. ZARTER,
Record Clerk.

CC: Director, Bureau of Prisons
Inmate
File
U. S. Marshal, Topeka, Kansas.

Withdrawal—Federal Detainer

District Court of the United States,
Northern District of California

No. 29233-E

JOHN WALDON,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Peniten-
tiary, Alcatraz, California,

Respondent.

ORDER TO SHOW CAUSE

Good cause appearing therefor and upon reading the verified petition on file herein;

It Is Hereby Ordered that E. B. Swope, Warden of the United States Penitentiary, at Alcatraz

Island, State of California, appear before this Court on the 4th day of November, 1949, at the hour of 10 o'clock a.m. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this order be served upon the United States Attorney for this District, his representative herein.

Dated: Oct. 25, 1949.

/s/ HUBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed Oct. 25, 1949.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now E. B. Swope, Warden of the United States Penitentiary, at Alcatraz, California, respondent herein, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a Writ of Habeas Corpus should not issue herein, shows as follows:

I.

That the person hereinafter called "the petitioner," on whose behalf the Petition for Writ of

Habeas Corpus was filed, is detained by the respondent, E. B. Swope, as Warden of the United States Penitentiary, at Alcatraz, California, under and by virtue of the judgment and sentence and warrant of commitment duly and regularly issued in criminal cause numbered 15076 by the District Court of the United States for the Eastern District of Illinois on the 5th day of February, 1940, and by virtue of the judgment and sentence and warrant of commitment duly and regularly issued in criminal cause numbered 7237 by the District Court of the United States for the District of Kansas on the 26th day of August, 1943, and transfer order dated the 11th day of November, 1943, issued at Washington, D. C., by direction of the Attorney General of the United States, and signed by Frank Loveland, Assistant Director of the Bureau of Prisons of the Department of Justice of the United States of America;

II.

That attached hereto and made a part hereof, as "Exhibit A," are the following:

(1) Certified copy of indictment filed September 6, 1939, judgment and commitment issued February 5, 1940, order modifying sentence entered September 29, 1944, order denying motion to vacate judgment of conviction entered May 12, 1949, and docket entries, in the matter of the United States of America v. John Frank Waldon, alias, etc., in said criminal cause numbered 15076 in the

District Court of the United States for the Eastern District of Illinois;

(2) Copy of judgment and commitment issued August 26, 1943, in the matter of the United States of America v. John Frank Waldon, alias, etc., in said criminal cause numbered 7237 in the District Court of the United States for the District of Kansas;

(3) Copy of transfer order, as aforesaid;

(4) Copy of record of court commitment No. 620-AZ, United States Penitentiary, Alcatraz, California;

III.

That the contentions advanced by the petitioner in his application for writ of habeas corpus on file herein were, in substance, also urged by him in said criminal cause numbered 15076 before the District Court of the United States for the Eastern District of Illinois in his motion to vacate his judgment of conviction, which was decided adversely to him, as hereinabove set out, on May 12, 1949; that the Court in denying the motion to vacate the judgment of conviction also filed a memorandum opinion, reported in 84 Fed. Supp. 449, entitled "Waldon v. United States," which opinion is hereby referred to and incorporated herein as though set forth in full.

Wherefore, respondent prays that the petition for writ of habeas corpus herein be denied and the or-

der to show cause heretofore issued herein be discharged.

Dated: November 7th, 1949.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ JOSEPH KARESH,
Assistant U. S. Attorney,
Attorneys for Respondent.

Exhibit A

(Copy)

(Indictment—Violation of Postal Laws)

In the District Court of the United States of America for the Eastern District of Illinois, September Term, A.D. 1939.

Eastern District of Illinois: ss—The Grand Jurors for the United States of America empaneled and sworn in the District Court of the United States of America, for the Eastern District of Illinois, at the September Term of said court in the year 1939, and inquiring for said district upon their oaths present: that

John Frank Waldon,
alias John Larry Rankin,
alias James Baker,
alias James Kelly,
alias John Bercovitz,

alias Jimmie Dixon,
alias George A. Dixon,
alias J. Rogers,
alias Charles Darnell.

James Arthur Tracy,
alias A. E. Hines,
alias Ralph E. Clark, and

John Blackwell
alias "Johnny,"

hereinafter called the defendants, on or about the 31st day of July, A.D. 1939, at or near Onarga, in the County of Iroquois, in the State of Illinois, in the Eastern District of Illinois, and within the jurisdiction of this Court, unlawfully, willfully, knowingly and feloniously did destroy certain mail matter, to wit: a certain letter bearing three cents (3c) in cancelled postage addressed to Mrs. Rose Holtzman, Conference Grounds, Cedar Lake, Indiana, postmarked at Onarga, Illinois, July 31, 1939, nine o'clock a.m., which said mail matter was a part of the United States mail then and there contained in an authorized depository for mail matter, to wit: Railway Post Office Car No. 328, being part of the Chicago and New Orleans Railway Post Office Train No. 31, operated by the Illinois Central Railway Company, which said mail matter had not theretofore been delivered to the person to whom it was sent and was then and there in the charge and custody of the United States Post Office estab-

lishment and in course of conveyance by mail from said Onarga, Illinois, to said Cedar Lake, Indiana.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the same in such case made and provided.

/s/ ARTHUR ROE,

United States Attorney.

Count Two

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: that

John Frank Waldon,

alias John Larry Rankin,

alias James Baker,

alias James Kelly,

alias John Bercovitz,

alias Jimmie Dixon,

alias George A. Dixon,

alias J. Rogers,

alias Charles Darnell,

James Arthur Tracy,

alias A. E. Hines,

alias Ralph E. Clark, and

John Blackwell,

alias "Johnny,"

hereinafter called the defendants, on or about the 31st day of July, A.D. 1939, at or near Onarga, in the County of Iroquois, in the State of Illinois, in the Eastern District of Illinois, and within the jurisdiction of this Court, unlawfully, willfully,

knowingly and feloniously did destroy certain mail matter, to wit: a certain letter bearing three (3c) in cancelled postage addressed to Mr. C. M. Wilson, 777 No. Meridian St., Indianapolis, Ind., post-marked Onarga, Illinois, July 31, 1939, nine-thirty o'clock a.m., which said mail matter was a part of the United States mail then and there contained in an authorized depository for mail matter, to wit: Railway Post Office Car No. 328, being part of the Chicago and New Orleans Railway Post Office Train No. 31, operated by the Illinois Central Railway Company, which said mail matter had not theretofore been delivered to the person to whom it was sent and was then and there in the charge and custody of the United States Post Office Establishment and in course of conveyance by mail from said Onarga, Illinois, to said Indianapolis, Indiana.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the same in such case made and provided.

/s/ ARTHUR ROE,

United States Attorney.

Count Three

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: that

John Frank Waldon,
alias John Larry Rankin,
alias James Baker,
alias James Kelly,

alias James Bercovitz,
alias Jimmie Dixon,
alias George A. Dixon,
alias J. Rogers,
alias Charles Darnell,

James Arthur Tracy,
alias A. E. Hines,
alias Ralph E. Clark, and

John Blackwell,
alias "Johnny,"

hereinafter called the defendants, on or about the 31st day of July, A.D. 1939, at or near Onarga, in the County of Iroquois, in the State of Illinois, in the Eastern District of Illinois, and within the jurisdiction of this Court, unlawfully, willfully, knowingly and feloniously did destroy certain mail matter, to wit: a certain letter bearing three cents (3c) in cancelled postage addressed to Mr. Elmer Jean, Campbellsburg, Indiana, R.F.D. No. 1, postmarked Onarga, Illinois, July 31, 1939, nine o'clock a.m., which said mail matter was a part of the United States mail then and there contained in an authorized depository for mail matter, to wit: Railway Post Office Car No. 328, being part of the Chicago and New Orleans Railway Post Office Train No. 31, operated by the Illinois Central Railway Company, which said mail matter had not theretofore been delivered to the person to whom it was sent and was then and there in the charge and custody of the

United States Post Office Establishment and in course of conveyance by mail from said Onarga, Illinois, to said Campbellsburg, Indiana.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the same in such case made and provided.

/s/ ARTHUR ROE,

United States Attorney.

Count Four

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: that

John Frank Waldon,
alias John Larry Rankin,
alias James Baker,
alias James Kelly,
alias John Bercovitz,
alias Jimmie Dixon
alias George A. Dixon,
alias J. Rogers,
alias Charles Darnell,

James Arthur Tracy,
alias A. E. Hines,
alias Ralph E. Clark, and

John Blackwell,
alias "Johnny,"

hereinafter called the defendants, on or about the 31st day of July, A.D. 1939, at or near Onarga, in the County of Iroquois, in the State of Illinois, in

the Eastern District of Illinois, and within the jurisdiction of this Court, unlawfully, willfully, knowingly and feloniously did assault a certain person having lawful charge, control and custody of mail matter of the United States, to wit, Guy O'Hern, who was then and there an employee of the Post Office Establishment of the United States, to wit: a railway postal clerk, who was then and there in charge of mail matter in an authorized depository for mail matter, to wit: mail car No. 328, being a part of Chicago and New Orleans Railway Post Office Train No. 31, operated by the Illinois Central Railway Company, said defendants then and there assaulting the said Guy O'Hern with the intent then and there to rob, steal and purloin the aforesaid mail matter of the United States, the said defendants then and there well knowing that said Guy O'Hern was an employee of the Post Office Establishment of the United States and in charge and custody of the aforesaid mail matter.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the same in such case made and provided.

/s/ ARTHUR ROE,

United States Attorney.

Count Five

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: that

John Frank Waldon,

alias John Larry Rankin,

alias James Baker,
alias James Kelly,
alias John Bercovitz,
alias Jimmie Dixon,
alias George A. Dixon,
alias J. Rogers,
alias Charles Darnell,

James Arthur Tracy,
alias A. E. Hines,
alias Ralph E. Clark, and

John Blackwell,
alias "Johnny,"

hereinafter called the defendants, on or about the 31st day of July, A.D. 1939, at or near Onarga, in the County of Iroquois, in the State of Illinois, in the Eastern District of Illinois, and within the jurisdiction of this Court, unlawfully, willfully, knowingly and feloniously did assault a certain person having lawful charge, control and custody of mail matter of the United States, to wit: Earl C. Boothman, who was then and there an employee of the Post Office Establishment of the United States, to wit: a railway postal clerk, who was then and there in charge of mail matter in an authorized depository for mail matter, to wit: mail car No. 328, being a part of Chicago and New Orleans Railway Post Office Train No. 31, operated by the Illinois Central Railway Company, said defendants then and there assaulting the said Earl C. Boothman with the intent then and there to rob, steal and pur-

join the aforesaid mail matter of the United States, the said defendants then and there well knowing that said Earl C. Boothman was an employee of the Post Office Establishment of the United States and in charge and custody of the aforesaid mail matter.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the same in such case made and provided.

/s/ ARTHUR ROE,

United States Attorney.

Count Six

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: that

John Frank Waldon,

alias John Larry Rankin,

alias James Baker,

alias James Kelly,

alias John Bercovitz,

alias Jimmie Dixon,

alias George A. Dixon,

alias J. Rogers,

alias Charles Darnell,

James Arthur Tracy,

alias A. E. Hines,

alias Ralph E. Clark, and

John Blackwell,

alias "Johnny,"

hereinafter called the defendants, on or about the

31st day of July, A.D. 1939, at or near Onarga, in the County of Iroquois, in the State of Illinois, in the Eastern District of Illinois, and within the jurisdiction of this Court, unlawfully, willfully, knowingly and feloniously did assault a certain person having lawful charge, control and custody of mail matter of the United States, to wit: Guy O'Hern, who was then and there an employee of the Post Office Establishment of the United States, to wit: a railway postal clerk, who was then and there in charge of mail matter in an authorized depository for mail matter, to wit: mail car No. 328, being a part of Chicago and New Orleans Railway Post Office Train No. 31, operated by the Illinois Central Railway Company, said defendants then and there assaulting the said Guy O'Hern with the intent then and there to rob, steal and purloin the aforesaid mail matter of the United States, the said defendants then and there well knowing that said Guy O'Hern was an employee of the Post Office Establishment of the United States and in charge and custody of the aforesaid mail matter, and that said defendants in attempting then and there to effect such robbery, did wound said Guy O'Hern by the use of a dangerous weapon.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the same in such case made and provided.

/s/ ARTHUR ROE,

United States Attorney.

Count Seven

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: that

John Frank Waldon,
alias John Larry Rankin,
alias James Baker,
alias James Kelly,
alias John Bercovitz,
alias Jimmie Dixon,
alias George A. Dixon,
alias J. Rogers,
alias Charles Darnell,

James Arthur Tracy,
alias A. E. Hines,
alias Ralph E. Clark, and

John Blackwell,
alias "Johnny,"

hereinafter called the defendants, on or about the 31st day of July, A.D. 1939, at or near Onarga, in the County of Iroquois, in the State of Illinois, and within the jurisdiction of this Court, unlawfully, willfully, knowingly and feloniously did assault a certain person having lawful charge, control and custoday of mail matter of the United States, to wit: Earl C. Boothman, who was then and there an employee of the Post Office Establishment of the United States, to wit: a railway postal clerk, who was then and there in charge of mail matter in an authorized depository for mail matter, to wit: mail

car No. 328, being a part of Chicago and New Orleans Railway Post Office Train No. 31, operated by the Illinois Central Railway Company, said defendants then and there assaulting the said Earl C. Boothman with the intent then and there to rob, steal and purloin the aforesaid mail matter of the United States, the said defendants then and there well knowing the said Earl C. Boothman was an employee of the Post Office Establishment of the United States and in charge and custody of the aforesaid mail matter, and that said defendants did then and there in attempting to effect said robbery, put the life of the said Earl C. Boothman in jeopardy by the use of a dangerous weapon, to wit: a revolver.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the same in such case made and provided.

/s/ ARTHUR ROE,

United States Attorney.

A true bill,

FRANK L. LAKE,

Foreman.

Filed in open court this day of,
A.D. 19.....

[Endorsed]: Filed Sept. 6, 1939, U.S.D.C. Eastern District of Illinois, D. H. Reed, Clerk.

Bail, \$25,000.00.

ARTHUR ROE,

U. S. Attorney.

District Court of the United States
Eastern District Illinois Division
Regular September, 1939, Term
No. 15076

UNITED STATES

vs.

JOHN FRANK WALDON, Alias, Etc.

Criminal Indictment in Seven Counts for Violation
of U.S.C., Title 18, Secs. 320, 82 and 317,
U.S.C.A.

JUDGMENT AND COMMITMENT

On this 5th day of February, 1940, came the United States Attorney, and the defendant, John Frank Waldon, alias, etc., appearing in proper person, and by Julius Reznik, his attorney, and,

The defendant having been convicted on Verdict of Guilty of the offense charged in the Indictment in the above-entitled cause, to wit, An Indictment of Seven Counts for Violation of Postal Laws, charging in 1st Count, Destroying Certain Mail Matter; 2nd Count, Destroying Certain Mail Matter; 3rd Count, Destroying Certain Mail Matter; 4th Count, Assault; 5th Count, Assault; 6th Count, Assault; and 7th Count, Assault, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the Penitentiary type to be designated by the Attorney General or his authorized representative for the period of

Five Years from this date on each of Counts 1, 2, 3, 4, and 5,—said sentences to run and be served Consecutively with each other.

Twenty-five Years and Ten Thousand (\$10,000.00) Dollar Fine on the 6th Count of said Indictment.

Twenty-five Years and Ten Thousand (\$10,000.00) Dollar Fine on the 7th Count of said Indictment—sentence on Counts 6 and 7 to run Consecutively with each other but Concurrently with sentences imposed on Counts 1, 2, 3, 4, and 5 of said Indictment, and that said defendant stand committed to said Institution until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ WALTER C. LINDLEY,
Judge.

Examined and Approved:

/s/ RAY M. FOREMAN,
Assistant U. S. Attorney.

In the District Court of the United States
for the Eastern District of Illinois

No. 15076

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN FRANK WALDON,

Defendant.

ORDER

Now on this 29th day of September, A.D. 1944, it appearing to the Court from an examination of the records of this Court in the above-entitled case that a certain sentence was imposed upon the Defendant John Frank Waldon upon February 5th, A.D. 1940, wherein the said John Frank Waldon was sentenced to serve twenty-five years and pay a fine of \$10,000 on Count Six of the indictment and to serve a term of twenty-five years and pay a fine of \$10,000 on Count Seven of said indictment, the sentences on counts Six and Seven to run consecutively with each other but concurrently with sentence imposed by this Court on Counts One, Two, Three, Four and Five of said indictment.

And it further appearing to this Court that said sentences and fines imposed on Counts Six and Seven of said indictment related to offenses embraced within the provisions of Section 320, Title 18 of the United States Code and it further appear-

ing from an examination of the provisions of said statute that no provision is made therein for the imposition of fines, and that the imposition of fines was inadvertently made and not authorized.

Now Therefore, it is hereby Ordered that the imposition of sentence made by this Court against the said John Frank Waldon under date of February 5th, 1940, be modified to the extent of eliminating therefrom the assessment or imposition of fines on Counts Six and Seven of said indictment.

It is further Ordered by the Court that this order be entered nunc pro tunc as of February 5th, 1940.

Entered this 29th day of September, A.D. 1944.

/s/ WALTER C. LINDLEY,

U. S. District Judge.

Attest: A True Copy.

.....,

Clerk.

[Endorsed]: Filed Sept. 29, 1944, U.S.D.C.,
Eastern District of Illinois, D. H. Reed, Clerk.

In the District Court of the United States for the
Eastern District of Illinois, Thursday, May
12th, A.D. 1949.

Present: Honorable Walter C. Lindley,
Judge.

Criminal Indictment No. 15076

Violation of Postal Laws

THE UNITED STATES OF AMERICA

vs.

JOHN FRANK WALDON, Alias JOHN LARRY
RANKIN, Alias JAMES BAKER, Alias
JAMES KELLY, Alias JOHN BERCOVITZ,
Alias JIMMIE DIXON, Alias GEORGE A.
DIXON, Alias J. ROGERS, Alias CHARLES
DARNELL.

ORDER

And now on this 12th day of May, A.D. 1949, it
appearing to the Court that said defendant John
Frank Waldon, alias etc., has filed a motion to va-
cate the judgment of conviction under Section 2255,
Title 28, U.S.C.,—and after being fully advised in
the premises,—

It Is Ordered by the Court that the sentence upon
Counts One, Two, Three, Four and Five will stand
as originally entered; that the sentences upon
Counts Six and Seven, shall run concurrently with
each other and concurrently with the sentences im-

posed on Counts One, Two, Three, Four and Five, so that the total sentence of said defendant will be twenty-five years in all.

/s/ WALTER C. LINDLEY,
Judge.

[Endorsed]: Filed May 12, 1949, U.S.D.C., Eastern District of Illinois, D. H. Reed, Clerk.

Docket Entries

Cr. 15076

UNITED STATES

vs.

JOHN FRANK WALDON, et al.

1944

Sept. 29—Enter Order nunc pro tunc as of 2-5-1940, modifying sentence to the extent of eliminating therefrom, the assessment or imposition of fines of John Frank Waldon on Counts 6 and 7 of said Indictment.

1948

Aug. 20—File Certificate of Clerk in re: collections from Defendant John Frank Waldon.

Aug. 20—Certified copies of Order and certificate mailed to John Frank Waldon, Alcatraz, California.

Sept. 24—File Motion to Vacate Void Judgment and conviction of John Frank Waldon. (Copy to Ray M. Foreman, Danville, Illinois.)

1949

- Apr. 6—File Motion of U. S. to Dismiss Motion to Defendant John Frank Waldon to vacate Void Jdg. and conviction. (Copy to Defendant.)
- Apr. 18—Motion of Defendant John Frank Waldon for extension of time to file reply brief to 4-27-1949. (Copy to Ray M. Foreman, Danville, Illinois.)
- Apr. 22—File Reply Brief of Defendant John Frank Waldon. (Copy to Ray M. Foreman.)
- May 12—File Findings of Fact & Conclusions of Law “Sentence on Counts 1, 2, 3, 4 and 5 will stand; sentences on Counts 6 and 7 be fixed as they are now at 25 years each without fines and shall run concurrently with sentence imposed on Counts 1, 2, 3, 4 and 5, so that total sentence of defendant Waldon will be 25 years in all. Clerk will enter Judgment accordingly. In all other respects, motion is denied. (Copies to J. F. Waldon, #620 Alcatraz, California — The Attorney General, Washington, D. C.—U. S. Attorney, Danville, Illinois and U. S. Clerk, East St. Louis, Illinois.)
- May 12—Enter Order in accordance with Findings of Fact and Conclusions of Law (Drawn).

District Court of the United States of America
Eastern District of Illinois

I, D. H. Reed, Clerk of the District Court of the United States for the Eastern District of Illinois, and keeper of the records and seals thereof, do hereby certify the foregoing to be a true copy of Indictment, filed September 6th, 1939; Judgment and Commitment, issued February 5th, 1940 and Order entered September 29th, 1944, in the matter of The United States of America vs. John Frank Waldon, alias, etc., in Cr. 15076, as fully as the same appears from the original documents now on file and orders now of record in this Court and in my hands as such Clerk. I further certify the docket entries listed herein are the only docket entries in the Danville Office in the above mentioned case.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in the City of Danville, in the District aforesaid, this 25th day of October A.D. 1949.

/s/ D. H. REED,
Clerk.

(Copy)

District Court of the United States
District of Kansas, First Division

No. 7237

Criminal indictment in one count for violation of U.S.C., Title 18, Secs. 753h.

UNITED STATES,

vs.

JOHN FRANK WALDON, with aliases: John Bercovitz, Jimmie Dixon, George A. Dixon, John Larry Rankin, James Baker, James Jelly, J. Rogers, Charles Darnell.

JUDGMENT AND COMMITMENT

On this 26th day of August, 1943, came the United States Attorney, and the defendant John Frank Waldon, with aliases, appearing in proper person, and by counsel appointed by the court, George Melvin, at Kansas City, Kansas and,

The defendant having been convicted on plea of guilty of the offense charged in the indictment in the above-entitled cause, to wit: attempt to escape from the United States Penitentiary at Leavenworth, Kansas, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one (1) day, to begin at the expiration of the sentence he is now serving in the United States Penitentiary at Leavenworth, Kansas, and to run consecutive thereto.

It Is Further Ordered that said period of imprisonment be served in the county jail in the county within which the defendant is serving at the time of his release therefrom.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

O.K.

FRANK R. COLLINS,
Asst. U. S. Attorney.

/s/ STEPHEN S. CHANDLER, Jr.,
United States District Judge.

A True Copy. Certified this 20th day of September, 1943.

/s/ HOWARD F. McCUE,
Clerk.

By /s/ ADALINE WHITE,
Deputy Clerk.

A true record.

By /s/ C. W. SUNDSTROM,
Record Clerk, U.S.P. Alcatraz, California.

(Copy)

Administrative Form No. 66

November 1938

Department of Justice, Washington

November 11, 1943

To the Warden, United States Penitentiary, Leavenworth, Kansas

Whereas, in accordance with the authority contained in title 18, sections 744b and 753f, U. S. Code, the Attorney General by the Director of the Bureau of Prisons has ordered the transfer of John Frank Waldon, #56411 from the United States Penitentiary, Leavenworth, Kansas to the United States Penitentiary, Alcatraz, California.

Now Therefore you, the above-named officer, are hereby authorized and directed to execute this order by causing the removal of said prisoner, together with the original writ of commitment and other official papers as above ordered and to incur the necessary expense and include it in your regular accounts.

And you, the warden, superintendent, or official in charge of the institution in which the prisoner is now confined, are hereby authorized to deliver the prisoner in accordance with the above order; and you, the warden, superintendent, or official in charge of the institution to which the transfer has been ordered, are hereby authorized and directed to receive the said prisoner into your custody and him

to safely keep until the expiration of his sentence or until he is otherwise discharged according to law.

By direction of the Attorney General,

JAMES V. BENNETT,

Director, Bureau of Prisons.

/s/ FRANK LOVELAND,

Safer custody

Acting Assistant Director.

Original—To be left at institution to which prisoner is transferred.

A True Copy:

By /s/ C. W. SUNDSTROM,

Record Clerk, USP,

Alcatraz, Calif.

10-27-49

Record of Court Commitment

Department of Justice

Penal and Correctional Institutions

United States Penitentiary

Alcatraz, California

Inst. Name: John Frank Waldon

No. 620-AZ

Alias: John Bercovita, Jimmie Dixon, Geo. A. Dixon, John Larry Rankin, James Baker, James Kelly, James Harris, etc.

Color: White

Age: 48 (8-7-01)

True Name: Inst.

Name and number of prior commitments to Fed.
Inst.: 56411-L (current case)

Offense: #1: P.O. Assault—Armed and Destroy
Mail. #2: Attempt Escape from Leavenworth

District: #1: E — Illinois — Danville, Judge W.
Lindley; #2: Kansas City, Kans., Judge Chandler,
Jr.

Sentence: #1: 25 years & #2: 1 day

Costs Fine: None

Sentence changed: May 12, 1949

New term: 25 yrs, 1 day

Reason therefor: 50 yr sentence reduced to 25 yr
by Court Order

Sentenced: #1: Feb. 5, 1940; #2: Aug. 26, 1943

When arrested: July 31, 1939

Committed to Fed. Inst.: Feb. 9, 1940—Leav.

Where arrested: Delray, Illinois

Sentence begins: Feb. 5, 1940

Residence: Chicago, Illinois

Eligible for parole: June 5, 1948

Time in jail before trial: Since arrest

Eligible for conditional release with good time:
Jan. 21, 1957 (with part GT*)

Rate per mo. good time: 10

Total good time possible: 3000 days

Eligible for con. rel. with extra good time: Mar.
11, 1956 (with 316 days industrial good time earned
to date)

Forfeited good time: June 10, 1943

Amount forfeited: (1523 days & 108 days IGT*)

Restoration good time: 12-4-47, 8-9-48

Amount restored: 730 and 730 days* (corrected
by new Law)

Expires full term: Feb. 5, 1965

Former Commitments on Sentence to
Other Institutions

No. B-4785

Name of Institution: State Reformatory

Location: Vandalia, Ill.

Type of Institution: Reformatory

Action of Board

Date: 9-49: Cont. xxx

10-14-49: Den. xxx

Releases and recommitments on present sentence
other than parole

Date: 8-26-43

Method: WHC-AP, K.C., & retd.

Date: 3-19-44

Method: Trans. to Alcatraz

Statistics Tabulated: No detainers.

[Endorsed]: Filed Nov. 7, 1949, U.S.D.C.,
Northern District of California, Southern Division.

In the United States District Court for the Northern District of California, Southern Division

No. 29,233-E

In the Matter of the Application of

JOHN WALDON, for a Writ of Habeas Corpus.

TRAVERSE TO RETURN TO ORDER
TO SHOW CAUSE

The above-named petitioner, John Waldon, in answer to the return of E. B. Swope, Warden of the United States Penitentiary, at Alcatraz, California, respondent herein, through Frank J. Hennessy, United States Attorney for the Northern District of California, to the writ of habeas corpus herein, respectfully shows that the commitment returned by the said E. B. Swope, Warden as aforesaid, as the cause of your petitioner's detention, is void and of no effect and was issued in violation of your petitioner's rights, privileges and immunities under the Constitution and laws of the United States for the reasons set forth in the petition for the issuance of the said writ, to which your petitioner now refers with the same force and effect as that the said petition were incorporated herein and set forth at length.

Government counsel presents its arguments strictly of course from the Government's point of view and properly so. But as a result it must be regarded with restraint, even caution for its fallacy lies in its lack of rationalization.

The Government does not deny that the petitioner is subjected to multiple punishment in violation of the Fifth Amendment, but predicates its sanctioning of such double punishment on the single bald statement of Judge Lindley, "Nor do I believe the partial payment of a void fine entitles defendant to discharge from the valid part of his sentence."

In so doing, the Government seeks to justify such complete defect by asserting that the fines were merely excessive and therefore presumably not punishment.

The Government resorts to the general rule that a sentence is legal so far as it is within the provisions of law and jurisdiction of the court and void as to the excess, when such excess is separable and may be dealt with, without disturbing the valid portion of the sentence. In order to bolster up such convenient reasoning, *United States v. Pridgeon*, 153 U.S. 48, is cited.

The argument is without merit since the *Pridgeon* case strongly supports petitioner's contention and is wholly consistent with the position taken here.

The fundamental flaw in the Government's seeking to adapt this case, lies in the fact that by weight of authority, such excess is separable only when the lawful part may be performed without performing the unlawful part. (39 C.J.S. 26 note 26.)

There are decisions, subsequent to and perhaps stemming from the *Bonner* and *Pridgeon* cases, where the words, "void as to the excess," were used,

but they were properly used. These were cases where two sentences had been improperly imposed for a single statutory violation. Such as the numerous bank robbery cases, the courts invariably holding that jeopardy does not attach until the prisoner is being subjected to a second punishment by the commencement of the illegal or excessive sentence and habeas corpus is not available until then. In such manner, perhaps, the use of the words "void as to the excess" arose. It is obvious that they may not properly be used in the present case.

In the instant case there is and can be no contention, but that the petitioner is subjected to punishment under both parts of this sentence at the present time.

No matter how strained a construction is attempted of the Pridgeon case, by Government Counsel, it is incapable of having read into it an intention on the part of the Supreme Court to lend itself to being a weapon of oppression for Government expediency rather than a bulwark against Government aggression.

Petitioner in his brief has cited many Supreme Court decisions holding that a sentence in a criminal case must conform directly to the statute and that any variation from its provisions either in the character or the extent of punishment inflicted, renders the judgment absolutely void. (Pet. Brief, pp 8-10 incl.)

In support of this same tenuous theory Government Counsel places its reliance on *Fowler v.*

Hunter, (C.A. 10). 167 F. 2d 548, which case is immediately distinguished from the present one since there was no fine paid. The complete defect in the instant case was not alone in the sentence as such but it was implemented by the collection of the fine. The partial payment of which was not a matter of choice, but of compulsion. The sanction of the fine being moreover of a different character than that provided by statute. Innumerable cases turn upon these distinctions.

The Government also urges that this partial payment of this illegal fine in addition to the sentence to imprisonment does not constitute double jeopardy, seeking to distinguish the Lange case and confine the ruling solely to the satisfaction of alternate punishments.

Petitioner's reliance on the Lange case and the precise ruling in such case is set forth in his brief. (Pet. Brief pp 3-4.) Petitioner urges in support of his contention, the basic principles so clearly enunciated upon which such ruling was established. As to this there can be no confusion. Petitioner has cited many Supreme Court cases stating plainly the exact principles upon which the Lange decision rests. (Pet. Brief pp 6-8.) It is these principles petitioner asks this Court to apply to the instant case.

The Constitutional prohibition is directed to multiple punishment, not as to whether such double punishment is an alternate sanction provided by statute.

In *DeBenque v. United States*, 85 F. 2d 202, the Court of Appeals for the District of Columbia, there stated, in footnote 4;

“It is to be noted that in *Ex parte Lange* the Supreme Court treated the judgment first rendered as erroneous, not absolutely void, notwithstanding the fact that it did not strictly pursue the terms of the penalty statute. This is no longer the rule as has been pointed out in the discussion of *In re Mills* and *In re Bonner supra*.”

It becomes manifest that a sentence of imprisonment imposed in a criminal case without warrant of law puts the person sentenced in custody in violation of the Constitution. The answers seems to lie in the Supreme Court decision, *In re Hans Nielsen*, 131 U.S. 176, where Mr. Justice Bradley said:

“The objection to the remedy of habeas corpus, of course, would be, that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on habeas corpus. But there are exceptions to this rule which more than once have been acted upon by this Court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. * * * In

the cases of Lange and Snow, there was a denial or invasion of a constitutional right. A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner.

“* * * In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction.”

Regardless what dialectical subtleties, what specious reasoning may be resorted to by Government Counsel, to explain away the critical language of the Lange case, the plain unvarnished truth of it is, the illegal sanction of the fine on each of the counts 6 and 7 is still double punishment precluded by the Fifth Amendment to the Constitution and violative of every judicial concept of common honesty.

Government Counsel has possibly as an afterthought, cited McNally v. Hill, 293 U.S. 131.

Petitioner believes, if the clearly defined principles of the Lange case are applied to the instant case, no *decussion* of the McNally case is necessary, if the principles of the Lange case are not applied, any discussion would be useless.

Throughout the whole history of these proceedings, Government Counsel, in opposition to both the earlier “Motion” and the present “Petition” has very carefully avoided any and all reference, by so little as a single word, phrase, or sentence, to the \$833.50 secured through distraint of petitioner’s

property and presently illegally held by the Government.

Petitioner, a layman unrepresented by counsel, believes that he may properly ask this Honorable Court, whether this singular reticence, this strange omission is not more indicative of an utter lack of legality, than any authority petitioner could quote? Does it not suggest a consciousness of wrong, perhaps more persuasive to this Court than even a Government confession of error?

II.

The Government does not deny that the petit jury was improperly selected or that women were not intentionally and arbitrarily excluded therefrom. It answers the petitioner's claim that his constitutional rights were violated with the contention that such question may not be determined by application for a writ of habeas corpus. Government Counsel also adopts the Memorandum Opinion of Judge Lindley.

Petitioner submits that his 'brief fully and completely controverts each and every statement in the said Opinion, relative to this point and repeated discussion would not be helpful.

The Government further urges in support of its case the decision in *Redman v. Squier*, 162 F. 2d 195, where this Court of Appeals held that: "As far as the *Ballard* case, *supra*, is concerned, it is not authority for the proposition that a grand jury panel can be attacked by habeas corpus proceedings.

The objection should be made seasonably, by motion to quash, or some similar motion."

Little argument need now be devoted to the Redman case in view of the fact that the Court of Appeals for the Ninth Circuit later qualified their ruling in *Rogers v. Squier* 174 F. 2d 348, decided May 4, 1949. It may only be stated in passing that there are vital distinctions in the Redman case and the case at bar. The defendant in the Redman case had been denied leave to proceed in forma pauperis and the case was therefore not properly before the Court. The objection was to the composition of the grand jury panel and was raised for the first time on habeas corpus. In the case at bar the objection is to the legal constitution of the petit jury panel and appears on the face of the record (R. p 9).

That this question may be raised on habeas corpus proceedings would now appear to be incontestable.

Judge Holtzoff of the District of Columbia in *United States v. Meyers*, 84 F. Supp. 766, there ruled:

"It is the Court's view, therefore, that the extent of the Court's jurisdiction and authority under Section 2255 is coextensive with the jurisdiction of the Court passing on an application for a writ of habeas corpus. That this construction of the statute is correct is shown by the decisions of the Court of Appeals of the Fourth Circuit."

Judge Holtzoff's statement and that of Judge Parker of the Fourth Circuit have a peculiar importance because section 2255 was drafted by a

committee appointed by the Judicial Conference of the United States, and Judge Parker was chairman of that committee and Judge Holtzoff a member.

In this connection, on motions to vacate, under section 2255, the question of the arbitrary elimination of women from the jury panels has already been decided on its merits by the Courts of Appeals in the following cases: *Wright v. United States*, (C.A. 8) 165 F. 2d. 405; *King v. United States*, (C.A. -8) 165 F. 2d 408; *York v. United States* (C.A. -8) 167 F. 2d 847; *Brown v. United States* (C.A. 8) 165 F. 2d 409; *Williams v. United States* (C.A. 5) 168 F. 2d 866; *Alger v. United States* (C.A. 7) 171 F. 2d 667. It was also heard on the merits by the Court of Appeals for the Ninth Circuit in *Dean v. United States* 169 F. 2d 71.

It is obvious therefore since jurisdiction under section 2255 has been held to be coextensive with jurisdiction of the Court passing upon an application for a writ of habeas corpus, that this Court may properly decide this question.

The United States Court of Appeals for the Ninth Circuit has heard applications for a writ of habeas corpus on the jury question in *Kelly v. Squier*, 166 F. 2d 731 and *Rogers v. Squier*, 174 F. 2d 348 decided May 4, 1949, Rehearing denied June 9, 1949.

Since the decision in *Rogers v. Squier*, 174 F. 2d 348 was reached May 4, 1949, approximately two years after the holding in *Redman v. Squier*, 162 F. 2d 195 (May 16, 1947) relied upon by the Government, petitioner believes that *Rogers v. Squiers*,

supra, correctly states the law as it is presently, in the Ninth Circuit.

The holding there is not that this point may not be raised on habeas corpus, but that it is dependent upon whether the defendant has waived the point by failure to interpose suitable objection in the trial court.

From the language of the opinion it would seem obvious that had there been seasonable objection, the objection would have been sustained.

This Court of Appeals speaking through Judge Healy, there stated:

“Petitioner concedes that in the course of the proceeding in which he was convicted no point was made of the exclusion of women and no challenge of any sort interposed to the composition or authority of either the grand or petit jury functioning in his case.” Continuing, “We have repeatedly held it is waived unless seasonable objection has been interposed in some appropriate way.”

In all of the reported cases to which petitioner's attention has been directed, such was the sole basis of the ruling. Not that the question was necessarily ill founded as a legal criticism, but simply that since it had not been timely raised, it could not be presented for the first time, whether by direct appeal, by motion to vacate, by habeas corpus or by motion for new trial.

In the instant case such objection was properly made. (R., p. 9.)

Petitioner does not follow the Government's contention that assuming defendant's constitutional right to a jury trial has not been infringed upon there would be no reason for this Court to issue the writ.

Pertinent to this respect is a consideration which the Government carefully refrains from arguing. Although petitioner was denied the right to have women on his petit jury, women had already been called for jury duty in the federal district courts in Illinois in *United States v. Dressler*, 112 F. 2d 972. In the *Glasser* case there were six women jurors on *Glasser's* petit jury. The *Glasser* case went to trial on February 5, 1940, the same day on which the petitioner in the instant case was tried and denied the right to have women jurors. It seems plain that this was a violation of petitioner's right to due process under the Fifth Amendment to the Constitution.

Petitioner believes that due to the unusual circumstances of this case, that is the Government's reliance on policies of expediency, rather than the preservation of legal and moral standards, that he may properly ask that costs be awarded him. He does so ask.

Petitioner submits that his brief fully and completely answers each and every contention made by the Government in its brief.

Petitioner submits that for the reasons stated in his briefs that the conviction and sentences are void; that if this Honorable Court should rule in

the converse, the only subsequent sentences that can now be sustained under the form of judgment heretofore set forth, are five years under Count 1, and five years under Count 4. Petitioner who many years ago had fully completed such sentences and is otherwise remediless, submits that he should be discharged.

Respectfully submitted,

/s/ JOHN WALDON,

Petitioner in propria persona.

State of California,
County of San Francisco—ss.

John Waldon, being duly sworn, deposes and says: That he has read the foregoing traverse and knows the contents thereof, and that the same is in all respects true.

Subscribed and sworn to before me this 21st day of November, 1949.

[Seal] /s/ PAUL J. MADIGAN,

Associate Warden, U. S. Penitentiary, Alcatraz, Calif.

Records at U. S. Penitentiary, Alcatraz, California, indicate that John Waldon is a citizen of the United States.

Warden-Associate Warden authorized by the Act of February 11, 1938, to administer oaths.

[Endorsed]: Filed Nov. 15, 1949.

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR WRIT OF
HABEAS CORPUS AD SUBJICIENDUM

The petition for writ of habeas corpus filed by petitioner on October 20, 1949, is hereby denied upon the authority of the following cases:

McNally v. Hill, 293 U. S. 131, 55 S. Ct. 24;

Redmon v. Squier, 162 F. 2d 195;

Waldon v. U. S., 84 F. Supp. 449.

/s/ HERBERT W. ERSKINE,
U. S. District Judge.

[Endorsed]: Filed Nov. 23, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Sirs:

Please Take Notice, that the above named Petitioner hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of the United States District Court for the Northern District of California, Southern Division, entered in the office of the Clerk of the said Court on November 23, 1949, denying the Writ of Habeas Corpus in Case No. H. C. 29,233-E, and from each

and every part of said order as well as from the whole thereof.

Dated: November 29, 1949.

Respectfully submitted,

/s/ JOHN WALDON,

Petitioner-Appellant in
Propria Persona.

[Endorsed]: Filed Dec. 2, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS

Now comes the Petitioner and Appellant above named and makes and files the following statement of points, to-wit:

(1) That the Court erred in dismissing and refusing to sustain the Writ of Habeas Corpus herein on the ground that:

(a) A definite term of imprisonment and a \$20,000.00 fine was imposed on petitioner, where the statutory penalty provided for imprisonment only. \$833.50 of the illegally imposed fine was collected by distraint of personal property and covered into the United States Treasury. Several years later in the absence of petitioner and without notice to him, the Court vacated the illegally imposed fines without any reference to the money, which the government still retains. In these circumstances, the complete defect of such punishment, an invasion

of petitioner's right to the Constitutional immunity from a second punishment for the same offense, is precluded by the due process of law clause and the double jeopardy provision of the Fifth Amendment.

(b) Under the Fifth and Sixth Amendments to the Constitution and under the inherent power of the United States Supreme Court to direct the administration of justice in the Federal Courts, it was error rendering invalid the judgment of conviction, for the court to exclude all women from the petit jury panel when such exclusion was arbitrary and without cause, particularly after timely objection was made.

(c) That it was a violation of the double jeopardy provision of the Fifth Amendment for the Court to construe Section 194 of the Criminal Code as authorizing the imposition of separate, consecutive sentences under Counts 1, 2 and 3 and to impose such sentences.

(d) That it was a violation of the double jeopardy provision of the Fifth Amendment for the Court to construe Section 197 of the Criminal Code as authorizing the imposition of separate, consecutive sentences under Counts 4 and 5 and in failing to hold that Count 4 merged with Count 6 and Count 5 merged with Count 7.

Dated: November 30, 1949.

/s/ JOHN WALDON,
Petitioner-Appellant.

[Endorsed]: Filed Dec. 2, 1949.

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Honorable Clerk of the above named Court:

Please prepare under the ruling of the Court a transcript of the record in the above-entitled case, to be filed in the office of the Clerk of the United States Court of Appeals for the Ninth Circuit, San Francisco, California, under Notice of Appeal from this District Court, and to include:

1. Petition for the Writ of Habeas Corpus, Exhibits "B" and "F," and from Exhibit "A" include only:

- a. Placita, page 1.
- b. Colloquy between Court and Counsel, page 9.
- c. Motion for directed verdict, page 26.
- d. Motion for a new trial, page 26.
- e. Motion in arrest of judgment, page 26.

2. Order to show cause.

3. Return to order to show cause and all respondent's exhibits.

4. Traverse to return to order to show cause.

5. Order of United States District Judge, Herbert W. Erskine, of November 23, 1949.

6. Notice of Appeal.

7. This praecipe for Transcript of Record and Statement of Points.

Dated: November 30, 1949.

Respectfully submitted,

/s/ JOHN WALDON,

Petitioner-Appellant in

Propria Persona.

[Endorsed]: Filed Dec. 2, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing documents and accompanying Exhibit, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellant, to wit:

Petition for Writ of Habeas Corpus Contains Exhibits B, C, D, E and F.

Order to Show Cause.

Return to Order to Show Cause Contains Exhibits.

Traverse to Return to Order to Show Cause.

Order Denying Petition for Writ of Habeas Corpus Ad Subjiciendum.

Notice of Appeal.

Statement of Points.

Praeceptum for Transcript of Record.

Order Extending Time to Docket Appeal.

Exhibit A, accompanying Petition for Writ of Habeas Corpus.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of January, A.D., 1950.

C. W. CALBREATH,

Clerk,

[Seal] By /s/ M. E. VAN BUREN,

Deputy Clerk.

[Endorsed]: No. 12,465. United States Court of Appeals for the Ninth Circuit. John Waldon, Appellant, vs. E. B. Swope, Warden, United States Penitentiary, Alcatraz, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 21, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12,465

JOHN WALDON,

Appellant,

vs.

E. B. SWOPE, Warden, United States Peniten-
tiary, Alcatraz, California,

Appellee.

Appeal from the Southern Division of the United
States District Court for the Northern District
of California

STATEMENT OF POINTS TO BE RELIED ON
IN APPEAL AND AMENDED AND SUP-
PLEMENTAL DESIGNATION OF CON-
TENTS OF RECORD TO BE PRINTED

Pursuant to Rule 19 (6) of this Court, the appel-
lant states that it intends to rely on the following
points, to-wit:

(1) That the Court erred in dismissing and re-
fusing to sustain the Writ of Habeas Corpus herein
on the ground that:

(a) A definite term of imprisonment and a
\$20,000 fine was imposed on petitioner, where the
statutory penalty provided for imprisonment only.
\$833.50 of the illegally imposed fine was collected
by distraint of personal property and covered into
the United States Treasury. Several years later in

the absence of petitioner and without notice to him, the Court vacated the illegally imposed fines without any reference to the money, which the government still retains. In these circumstances, the complete defect of such punishment, an invasion of petitioner's right to the Constitutional immunity from a second punishment for the same offense, is precluded by the due process of law clause and the double jeopardy provision of the Fifth Amendment.

(b) Under the Fifth' and Sixth Amendments to the Constitution and under the inherent power of the United States Supreme Court to direct the administration of justice in the Federal Courts, it was error rendering invalid the judgment of conviction, for the court to exclude all women from the petit jury panel when such exclusion was arbitrary and without cause, particularly after timely objection was made.

(c) That it was a violation of the double jeopardy provision of the Fifth Amendment for the Court to construe Section 194 of the Criminal Code as authorizing the imposition of separate, consecutive sentences under Counts 1, 2 and 3 and to impose such sentences.

(d) That it was a violation of the double jeopardy provision of the Fifth Amendment for the Court to construe Section 197 of the Criminal Code as authorizing the imposition of separate, consecutive sentences under Counts 4 and 5, and in failing to hold that Count 4 merged with Count 6 and Count 5 merged with Count 7.

The appellant deems the following parts of the record as filed in the above entitled cause, necessary for the consideration of the points relied on.

1. Petition for the Writ of Habeas Corpus, Exhibits "B" and "F," and from Exhibit "A" include only:

- a. Placita, page 1.
- b. Colloquy between Court and Counsel, page 9.
- c. Motion for directed verdict, page 26.
- d. Motion for a new trial, page 26.
- e. Motion in arrest of judgment, page 26.

2. Order to show cause.

3. Return to order to show cause and all respondent's exhibits.

4. Traverse to return to order to show cause.

5. Order of United States District Judge, Herbert W. Erskine, of November 23, 1949.

6. Notice of Appeal.

7. Praecipe for Transcript of Record and Statement of Points.

8. This designation.

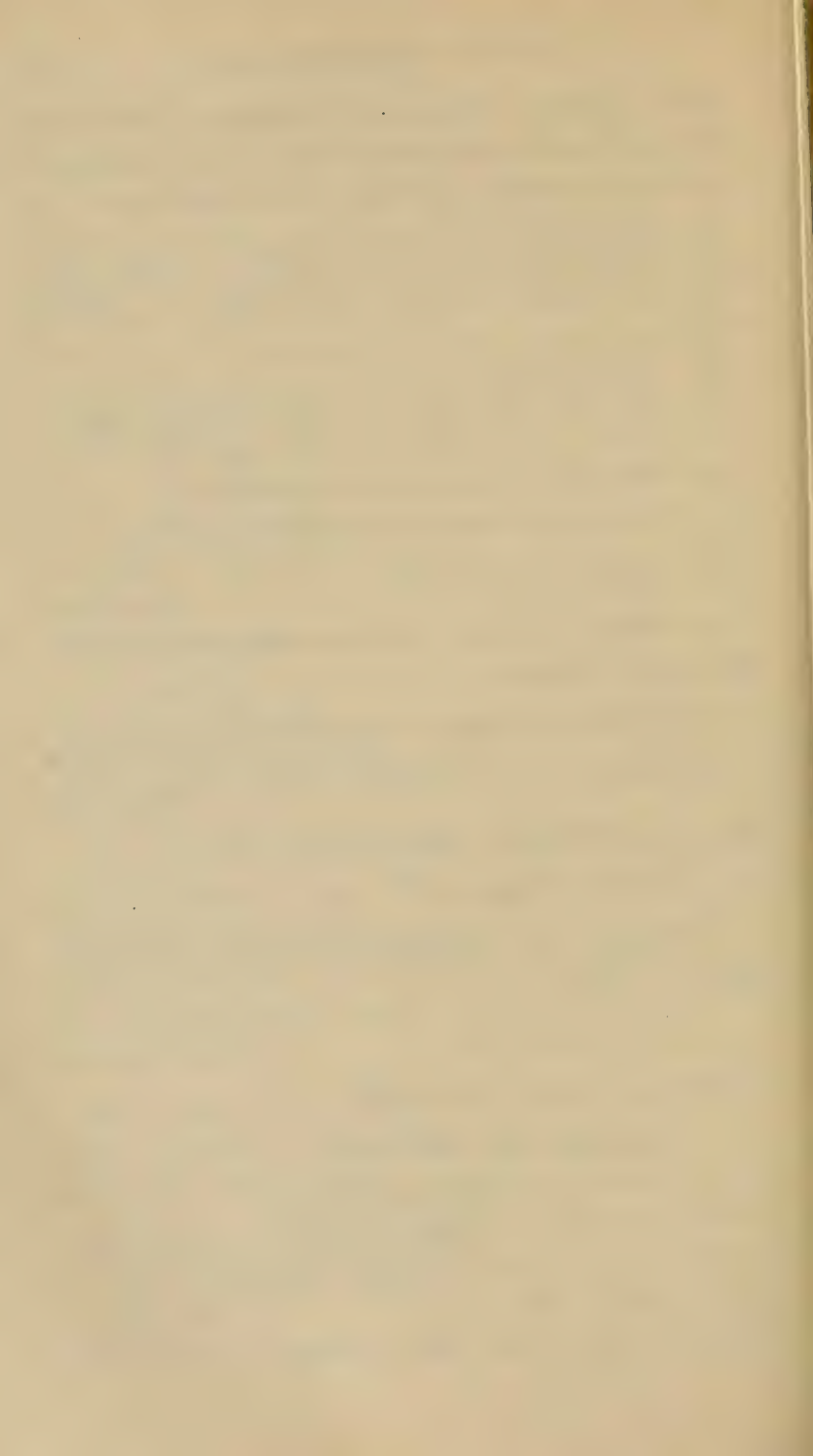
Dated: February 6th, 1950.

Respectfully submitted,

/s/ JOHN WALDON,

Petitioner-Appellant in
Propria Persona.

[Endorsed]: Filed Feb. 7, 1950.



No. 12,465

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN WALDON,

Appellant,

VS.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,
Post Office Building, San Francisco 1, California,

Attorneys for Appellee.

FILED

JUN 28 1950

PAUL P. O'BRIEN,

CLERK

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No. 12,465

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN WALDON,

Appellant,

vs.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called the "Court below", denying appellant's petition for a writ of habeas corpus. (Tr. 63.) The Court below had jurisdiction over the habeas corpus proceedings under

Title 28 U.S.C.A. Sections 2241, 2243 and 2255.

Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by

Title 28 U.S.C.A. Section 2253.

STATEMENT OF THE CASE.

The facts leading up to the filing of the instant petition for writ of habeas corpus and the contentions alleged therein are substantially set forth in the Memorandum Opinion of the trial Judge, the Honorable Walter C. Lindley, denying the appellant's motion to vacate his judgment and sentence,

Waldon v. United States (E. Dist. Ill.), 84 Fed. Supp. 449.

After the filing of the petition by the appellant, an inmate of the United States Penitentiary at Alcatraz, California (Tr. 2-11), the Court below issued an order to show cause (Tr. 21-22), the appellee filed a return to order to show cause (Tr. 22-50), and the appellant filed a traverse to return to order to show cause (Tr. 51-62). Thereafter the matter was submitted and the Court below filed the following order denying the petition for writ of habeas corpus:

“The petition for writ of habeas corpus filed by petitioner on October 20, 1949, is hereby denied upon the authority of the following cases:

McNally v. Hill, 293 U. S. 131, 55 S. Ct. 24;

Redmon v. Squier, 162 F. 2d 195;

Waldon v. U. S., 84 F. Supp. 449.

/s/ Herbert W. Erskine,
U. S. District Judge.

[Endorsed]: Filed Nov. 23, 1949.” (Tr. 63).

From this order appellant now appeals to this Honorable Court. (Tr. 63-64.)

ISSUES.

The issues involved herein may, in substance, be stated as follows:

Is the appellant entitled to relief by habeas corpus because

1. women were excluded from the trial jury panel, whose members convicted him in the Eastern District of Illinois in February of 1940?

and because

2. he was sentenced to fine and imprisonment under authority of a statute where only imprisonment was permitted and such fine was partially paid by distraint of his personal property before judgment was corrected in his absence to eliminate the fine?

ARGUMENT.

In *Waldon v. United States*, supra, Judge Lindley thoroughly considered the above contentions and adequately and effectively disposed of them when he denied appellant's motion to vacate his judgment and sentence. Accordingly, appellee adopts *in toto* as his argument in this appeal this Memorandum Opinion of Judge Lindley, the authorities cited therein, and the reasoning in support thereof, supplemented by the decisions of this Honorable Court in

Redmon v. Squier, 162 F. (2d) 195;

Kelly v. Squier, 166 F. (2d) 731, certiorari denied, 334 U. S. 849; and

McDonald v. Johnston, 149 F. (2d) 768,

together with the opinion of the Supreme Court of the United States in

McNally v. Hill, 293 U. S. 131.

In *Redmon v. Squier*, supra, cited with approval in *Kelly v. Squier*, supra, this Honorable Court held that objections to a jury panel can not be raised by habeas corpus. Appellant argues that this Court overruled this holding in a subsequent opinion in the case of

Rogers v. Squier, 174 F. (2d) 348.

A reading of this latter case shows no such intention on the part of this Court. As a matter of fact, in the *Rogers* case, this Court held that an attack upon a jury panel "is waived unless seasonable objection has been interposed *in some appropriate way*". (Italics supplied.) In our case at bar, it can not be said that the objection was interposed in an "appropriate way" for the reason that appellant, after making a motion to quash the petit jury panel on the ground that women were excluded therefrom, abandoned the objection by failing to argue it on appeal before the Appellate Court, and accordingly, precluded himself from raising the objection in a collateral proceeding, assuming, arguendo, that such an attack is cognizable in habeas corpus. Furthermore, under the facts of this particular case, the exclusion of women from the trial jury panel, the members of which convicted the appellant, was not improper but, on the contrary, as Judge Lindley indicated in his Memorandum Opinion, was at that time in conformity with prevailing practice in

Illinois, approved by the Supreme Court of the United States in

Glasser v. United States, 315 U. S. 60.

Equally without merit is the contention of the appellant that he has suffered double jeopardy because he was sentenced to fine and imprisonment under authority of a statute where only imprisonment was permitted and such fine was partially paid, as are also without merit appellant's further contentions that the imposition of the fine voided the judgment as did the correction of the judgment eliminating the fine, because it was done outside the presence of the said appellant. These contentions, as above indicated, have been effectively answered by Judge Lindley and need no further amplification from the appellee, except to add that it is well settled that where a Court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the authorized portion of the sentence a nullity, but leaves open to attack on habeas corpus only such portion of the sentence as is excessive. *McDonald v. Johnston*, supra. It should be noted that in the cases cited by the appellant where defendants were released after payment of fine, the statute imposed either imprisonment or a fine in the alternative. That a sentence may be reduced without the defendant being present is so fundamental as to need no argument.

Appellant relies on the decision of this Court in
Johnston v. Lagomarsino, 88 F. (2d) 86,

but conceding, for argument's sake, that this decision is applicable in our case at bar, the appellant nonetheless is not entitled to his release from the custody of the appellee, the Warden of the United States Penitentiary at Alcatraz, California, because he has not as yet served a term of imprisonment totaling 25 years, which, it goes without saying, is the valid portion of the judgment heretofore imposed against him. *McNally v. Hill*, supra.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the decision of the Court below is correct and should be affirmed.

Dated, San Francisco, California,
June 28, 1950.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellee.

In the
Court of Appeals
of the
United States
For the Ninth Circuit

In the Matter of the Application for a Writ
of Habeas Corpus of MAURICE DUNCAN,
Appellant,

v.

JOHN R. CRANOR, as Superintendent of the
Washington State Penitentiary,
Appellee.

No. 12466

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

SMITH TROY,

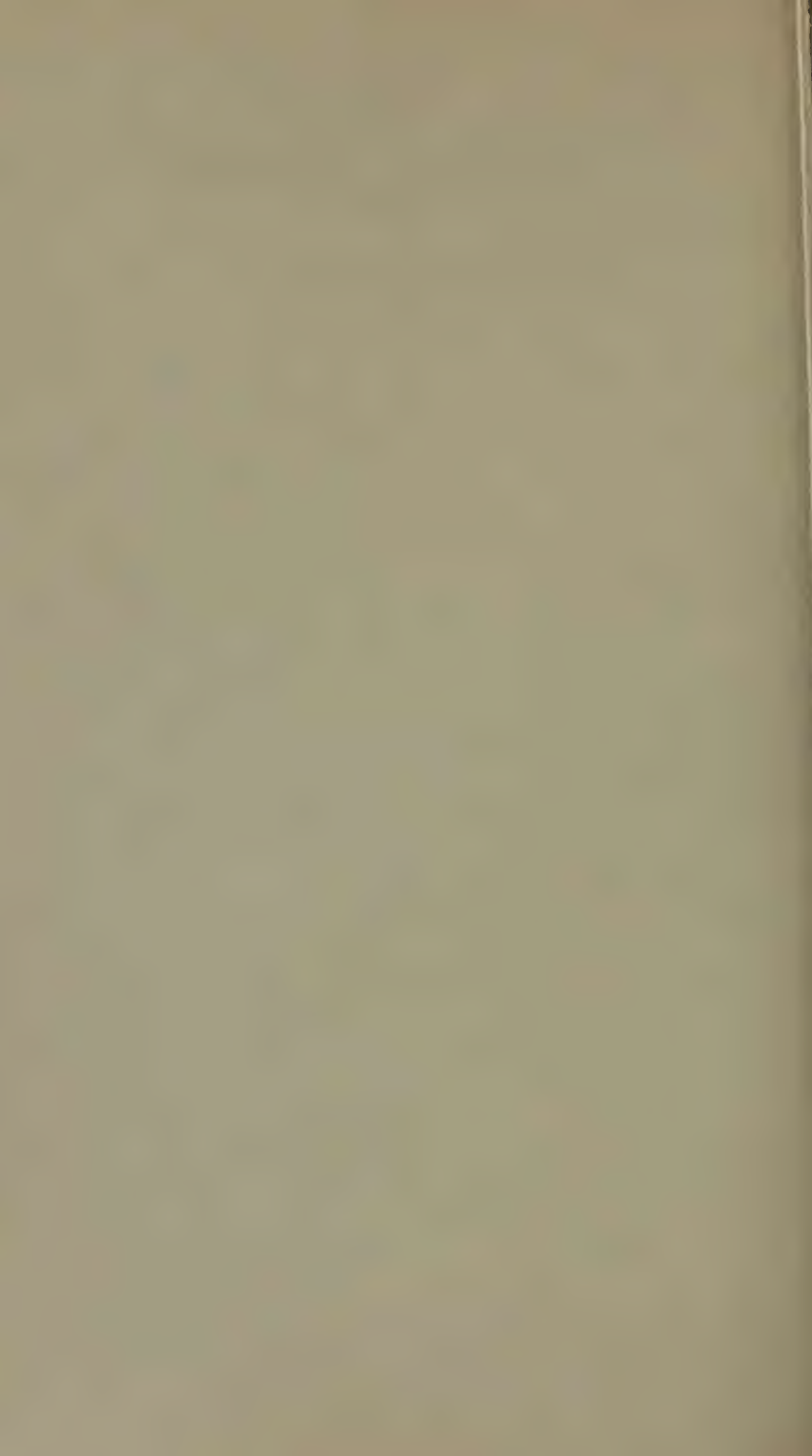
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HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Appellant originally filed a petition for a writ of habeas corpus with the Supreme Court of the State of Washington alleging the same grounds as were alleged in the District Court. In accordance with the procedure of the State of Washington regarding habeas corpus matters, the case was submitted to the Supreme Court for its consideration upon the basis of the pleadings, affidavits and written briefs submitted by each party. The application was denied by the Supreme Court of the State

in an order dated August 17, 1949 (Tr. 15). There is no showing that appellant sought a writ of certiorari from the Supreme Court of the United States to review that denial by the court. Appellant thereupon petitioned the district court for a writ of habeas corpus (Tr. 3-12), appellee answered (Tr. 17-19) and following a hearing upon the show cause order the court announced it would take the case under advisement (Tr. 34). Thereafter, the court announced in a letter to the parties that the petition would be denied and an order was entered on December 30, 1949, denying the petition (Tr. 44). A certificate of probable cause was granted (Tr. 45). Appellant contends the district court has jurisdiction to hear this habeas corpus matter on the ground that a question under the Constitution of the United States is involved. Although no reference was made to 28 U. S. C. 2241 (c) (3), it is assumed that that statute is applicable to give the federal court jurisdiction in this matter. Appellee contends the federal courts do not have jurisdiction for the reason that the state remedies available to the appellant have not been exhausted by him as required by 28 U. S. C. 2254 as a condition precedent to federal jurisdiction in habeas corpus matters involving state prisoners. Further discussion of this question will be submitted in the argument in support of the order.

COUNTER STATEMENT OF THE CASE

Appellant was charged by information in the Superior Court for Clallam County with the crime of carnal knowledge of a female child under the age of 18 years, to-wit 17 years. Upon a plea of guilty to the crime charged, judgment was entered February 27, 1939, sentencing him to the state reformatory at Monroe for a

maximum term of twenty years (Tr. 12-13). Subsequently, in accord with the laws of the State of Washington, appellant was transferred from the reformatory to the state penitentiary at Walla Walla. Appellant has three times been granted paroles from confinement and each time said parole has been revoked by order of the Board of Prison Terms and Paroles of the State of Washington. During the existence of the third and last parole appellant was discharged from "further parole supervision" pursuant to an order of said Board of July 16, 1946 (Tr. 37-42). Appellant contends that the "discharge from supervision" was a complete satisfaction of the criminal judgment and sentence and a release from parole. He contends that the order of the Board, dated March 25, 1948, revoking appellant's latest parole (Tr. 37) was an action in excess of its lawful powers, since under the laws in effect at the time of the judgment and sentence, the Board had no authority to detain a convicted person beyond the expiration date of the period of duration of confinement first fixed by the Board pursuant to law. Appellant contends also, that the revocation of parole, if authorized by an amendment to the law in effect at the time of judgment and sentence, imposed a new or additional punitive measure to a crime already consummated, in violation of the *ex post facto* prohibition of Article I, section 10, of the Constitution of the United States.

ARGUMENT

1. **The district court had no jurisdiction because appellant had not exhausted his state remedies at the time of petitioning for a writ of habeas corpus in the federal court.**

In order that the federal courts have jurisdiction over habeas corpus matters involving prisoners detained pursuant to a judgment of a state court, it is necessary that that prisoner exhaust his remedies prior to seeking redress in the court of the United States. The Revised Judicial Code (28 U. S. C. 2254) provides:

“An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

“An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.”

Honorable John J. Parker, Judge of the Court of Appeals for the Fourth Circuit, has written a valuable analysis of the rationale and intended operation of this section of the Judicial Code in his article entitled “Limiting the Abuse of Habeas Corpus” published in 8 F. R. D. 171, 175. Judge Parker’s analysis of the Code is of particular significance, since he participated in the drafting of the revision of the Code. He states that U. S. C. 2254 is largely a codification of the best practice as worked out by court decisions and says:

“ * * * The effect of this last provision [28 U. S. C. 2254] is to eliminate, for all practical pur-

poses, the right to apply to the lower federal courts for habeas corpus in all states in which successive applications may be made for habeas corpus to the state courts; for, in all such states, the applicant has the right, notwithstanding the denial of prior applications, to apply again to the state courts for habeas corpus and to have action upon such later application reviewed by the Supreme Court of the United States on application for certiorari.

"It may be argued that once a petitioner has applied for *habeas corpus* to the courts of the state and has been denied relief, he may proceed with his federal remedy without more ado, since further application to the state courts might well be presumed to be futile. The answer to this is that such further application to the state courts is not futile because it lays the foundation upon which application can be made to the Supreme Court of the United States for certiorari. This touches the heart of the question. The thing in mind in the drafting of this section was to provide that review of state court action be had so far as possible only by the Supreme Court of the United States, whose review of such action has historical basis, and that review not be had by the lower federal courts, whose exercise of such power is unseemly and likely to breed dangerous conflicts of jurisdiction.

** * * * *

"One of the incidents of the state remedy is right to apply to the Supreme Court for certiorari. If a petitioner has failed to make such application after the refusal of the state court to release him, he cannot be said to have exhausted the remedies available to him under state procedure, provided he has the right to apply again to the state courts for relief as a basis for application to the Supreme Court for certiorari. In the absence of the statutory provision contained in section 2254, it was open to the Supreme Court to hold that, after denial of relief by the State courts, petitioner might seek relief either by asking certiorari from the Supreme Court or filing petition for *habeas corpus* in the federal courts. Such a holding now, however, would be in the teeth of the statute, which forbids the granting of

the writ by the federal courts 'unless it appears that applicant has exhausted the remedies available in the courts of the State,' and which goes on to say that he shall not be deemed to have exhausted such remedies if he still has the right under the law of the state 'to raise, by any available procedure, the question presented.'

"The fact that certiorari from the Supreme Court to the state court may be called a federal remedy is not determinative of the question here involved. The crucial matter is that petitioner still has a right to attack in the courts of the state the validity of his conviction and, upon the record made in such attack, to petition the highest court of the land for a review. So long as such right remains, he does not have, and ought not have, the right to ask a review by one of the lower federal courts. Cases may arise, of course, where such review should be allowed, even though state remedies have not been exhausted; but this is taken care of by the 'special circumstances' exception of the statute. I think that nothing more than this was contemplated by the majority in the Mayo case [*Wade v. Mayo*, — U. S. —, 68 S. Ct. 1270, — L. ed. —]; but the effect of the statute is to give precision and definiteness to the rule and prevent attempts to have the lower federal courts review state court proceedings where there are no special circumstances justifying departure from the ordinary practice."

It is further stated by Judge Parker that one of the important things done by the Revised Judicial Code relating to the law of habeas corpus was that:

"* * * in the case of state prisoners, resort to the lower federal courts is practically eliminated where adequate remedy is provided by state law."
8 F. R. D., 171, 174.

In the State of Washington successive applications for a writ of habeas corpus may be made as is illustrated by the cases of *In re Lucas*, 26 Wn. (2d) 289, 173 P. (2d) 774, and *In re Lucas v. Smith*, 31 Wn. (2d) 50, 195 P. (2d) 131. In this case, then, the applicant should again petition

the state court and thereby lay the foundation for a petition for certiorari to the Supreme Court of the United States. Since appellant has not sought a writ of certiorari from the Supreme Court of the United States to review the denial of habeas corpus by the highest court of the State of Washington, and since the right to apply for certiorari is a part of the available state remedies (*Ex Parte Hawk*, 321 U. S. 114, — S. Ct. —, 88 L. ed. 572), it cannot be said that appellant exhausted his state remedies so as to give the District Court jurisdiction over this cause.

Can it be said that there is no adequate state remedy available or that the state's process is ineffective to protect the rights of state prisoners, so as to give the federal courts jurisdiction over habeas corpus matters involving such prisoners under the "special circumstances" exception of 22 U. S. C. 2254? That is largely the question here, since, in hearing the cause, the District Court apparently considered the state remedies ineffective or unavailable.

The scope of inquiry upon habeas corpus in the state courts is defined by section 3, chapter 256, Laws of Washington, 1947 (1075 Rem. Supp. 1947) which provides, so far as is material here, as follows:

"No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following:

"(1) Upon any process issued on any final judgment of a court of competent jurisdiction except where it is alleged in the petition that rights guaranteed the petitioner by the Constitution of the State of Washington or of the United States have been violated."

It is thus apparent that the State of Washington affords a range of inquiry equal to that granted by courts of any other jurisdiction, including the federal courts, although a strong presumption in favor of the record is recognized by the Washington Supreme Court. *In re Higdon*, 30 Wn. (2d) 546, 192 P. (2d) 744.

Under the State Constitution and statute, the Supreme Court of Washington and the Walla Walla County Superior Court have concurrent jurisdiction over habeas corpus matters involving prisoners of the state penitentiary at Walla Walla. Article 4, § 4 and Article 4, § 6, Washington Constitution; Rem. Rev. Stat., §§ 1 and 15. In practice, most applications for habeas corpus by inmates of the state penitentiary are made to the State Supreme Court. The practice therein is as follows: When a petition for a writ of habeas corpus is filed in the State Supreme Court an order is normally issued requiring the superintendent of the state penitentiary to show cause why the writ should not issue. A date is set for hearing upon that order, and at that time either party may present oral argument. In practice, oral argument is rarely presented unless the petitioner is represented by counsel, since prisoners are not normally brought from Walla Walla to Olympia to personally argue their cases. However, either party is permitted to present documentary proof or affidavits and to submit written argument. Where the petitioner alleges facts sufficient to constitute a *prima facie* case for release, and the record before the court does not show such allegations to be false, the court will issue the writ or an order to show cause returnable before a superior court of the state, at which time the petitioner is present and evidence is taken. This procedure has become necessary in the State

of Washington as the result of a flood of habeas corpus petitions flowing from the state penitentiary, of which applications a very small fraction were found to be meritorious. It will be observed that the state procedure is very similar to that followed in the federal courts. The only difference between the procedure in the federal and state courts lies in the fact that the District Court permits the actual presence of the petitioner at the hearing upon the show cause order, whereas the Washington Supreme Court does not. The fact that the prisoner is only rarely transported to the scene of the hearing upon the show cause order is immaterial however, since the sufficiency of a petition for a writ of habeas corpus may be inquired into upon an order to show cause, and the petitioner is not entitled as a matter of right to be present at the hearing upon such order. *Ex parte Hull*, 312 U. S. 546, — S. Ct. —, — L. ed. —; *Fathers v. Smith*, 25 Wn. (2d) 896, 171 P. (2d) 1012. In short, it is submitted that the state procedure is adequate to protect the rights of prisoners held in custody in the state institutions.

The state procedure being adequate, and being available to petitioners making successive applications, the failure of an appellant to apply to the Supreme Court of the United States for a writ of certiorari to review the denial of his habeas corpus petition by the highest court of the State of Washington and his failure to reapply to the state court should bar him from further consideration by a federal district court. Appellant has not exhausted all of the remedies available under the state procedure and the district court had no jurisdiction to hear the matter.

2. The "Discharge from Supervision" did not constitute a discharge from parole or a satisfaction of the criminal judgment.

The Washington law provides that upon conviction of a crime the sentencing court shall impose only the maximum term of imprisonment. Within six months after the admission of such convicted person to the penitentiary or reformatory the State Board of Prison Terms and Paroles has the duty of fixing the duration of confinement for that prisoner. In fixing the duration of confinement, the board is required to make investigations and to consider the recommendations of the sentencing judge and prosecuting attorneys. In addition, the Board is given the power to readjust the duration of confinement of a particular prisoner to a longer period of time for rule infractions, to allow good time credit under certain conditions, and to grant paroles to prisoners who are considered rehabilitated and fit subjects for release from confinement, said parolees to be subject to rules and regulations established by the Board. See chapter 114, Laws of Washington, 1935, as amended by chapter 142, Laws of Washington, 1939, and chapter 92, Laws of Washington, 1947 (Rem. Rev. Stat. Supp., 10249-2, et seq. and section 10249-2, Rem. Supp. 1947). The State Board of Prison Terms and Paroles has no power to terminate a judgment of a court of the State of Washington. It is an administrative body with only the power to determine whether a convict must serve his judgment and sentence *in confinement* or *out of confinement on parole*. It has no further power. There is no power to set aside a judgment short of the expiration of the entire maximum term provided by the court's judgment. The only such power to terminate a judgment is the pardon power which is vested exclusively in the governor.

The order discharging appellant from supervision was made while he was on parole in order to allow him to serve in the Merchant Marine (Tr. 25). This order (Tr. 38) was made pursuant to the rules and regulations which the Board is permitted to establish by section 4, chapter 114, Laws of 1935 as amended by section 1, chapter 142, Laws of 1939 (Rem. Rev. Stat. Supp. 10249-4):

“The Board of Prison Terms and Paroles shall have the power to establish rules and regulations under which a convicted person may be allowed to leave the confines of the penitentiary or the reformatory on parole, and shall also have the power to return such person to the confines of the institution from which he or she was paroled at its discretion.”

Though appellant was released from parole *supervision*, he was not discharged from *parole*. It will be noted that the order discharging appellant from parole supervision specifically denied the restoration of his civil rights (Tr. 38). Even had the Board attempted to grant a complete satisfaction of the judgment, such a grant would have been outside of its authority and thus void. Therefore, appellant is still subject to service in confinement of the maximum term under the judgment here involved. Inasmuch as that judgment and sentence have not been satisfied, appellant states no grounds upon which to base his writ.

3. There has been no violation of the ex post facto provisions of the Constitution of the United States.

It is appellant's contention that the Board of Prison Terms and Paroles of the State of Washington acted in excess of its authority in revoking appellant's parole by an order dated March 25, 1948 (Tr. 37) inasmuch as the Board had no power to confine a convicted person beyond the duration of confinement first fixed by the Board, ac-

ording to the laws in effect at the time of appellant's judgment and sentence. Appellant was sentenced under Chapter 114, Laws of Washington, 1935, which provides in part as follows:

"Sec. 2. * * * the court shall sentence such person to the penitentiary * * * and shall fix the maximum term of such person's sentence only * * *"

"* * * * *

"Within six (6) months after the admission of such convicted person to the penitentiary or the reformatory, as the case may be, the board of prison, terms and paroles shall fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense for which he or she was convicted or the maximum fixed by the court, where the law does not provide for a maximum term."

Chapter 114 provides further:

"The board of prison, terms and paroles may permit a convicted person to leave the buildings and enclosures of the penitentiary or the reformatory, as the case may be, on parole, after such convicted person has served the period of confinement fixed for him or her by the board of prison, terms and paroles, less time credits for good behavior and diligence in work as provided for by this board: *Provided*, That in no case shall the inmate be credited with more than one-third of his sentence as fixed by the board.

"The board of prison, terms and paroles shall have the power to establish rules and regulations under which a convicted person may be allowed to leave the confines of the penitentiary or the reformatory on parole, and shall also have the power to return such person to the confines of the institution from which he or she was paroled, at its discretion."

From the above cited provisions of Chapter 114, Laws of Washington, 1935, it is clear that the court sets a maximum sentence while the Board of Prison Terms

and Paroles fixes a duration of confinement period which must be served, less time credits for good behavior, before a convicted person may be released on parole. Appellant has confused the maximum term set by the court with the duration of confinement period. The only procedure by which a convicted person may be released from confinement is by parole, and he is only eligible for parole, under Washington law, after he has served his confinement period fixed by the Board, less time credits. Inasmuch as the statute empowers the Board to establish rules and regulations under which a convicted person may be allowed to leave the confines of the penitentiary, and to return such person to the confines of the penitentiary at its discretion, the parolee must be understood to have accepted the privilege of parole with whatever conditions are annexed, no matter how difficult or burdensome. Therefore, the Board was acting within its powers in revoking appellant's latest parole.

Appellant's final contention is that the above mentioned revocation of parole, although authorized under an amendment to Chapter 114, Laws of Washington, 1935, imposes an additional punitive measure to a crime already consummated in violation of the ex post facto prohibition of the federal constitution.

The amendment complained of was enacted in Chapter 142, section 1, Laws of Washington, 1939 (Rem. Rev. Stat. Supp. 10249-4), by the addition of the following language to Chapter 114, section 4, Laws of 1935:

"Provided further, that no prisoners shall be released from the penitentiary or the reformatory unless, in the opinion of the Board of Prison Terms and Paroles his rehabilitation has been complete and he is a fit subject for release, or until his maximum term expires."

“*Ex post facto* laws” have been defined in 11 Am. Jur. 1176, Constitutional Law § 348 as follows:

“The Supreme Court of the United States at different times has enunciated somewhat variant definitions of the phrase ‘*ex post facto* laws.’ The early and classic definition is as follows: ‘(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime, or makes it greater than it was when committed; (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender.’ An *ex post facto* law has also been defined as a law which punishes that which was innocent when done, which adds to the punishment of that which was criminal, which increases the malignity of a crime, or which narrows the rules of evidence, so as to make conviction more easy. Again it is said that a law, to be *ex post facto*, must be one that deprives the person accused of crime of a substantial right in which he was protected and granted immunity by the law in force at the time of the commission of the offense.”

The only classification material to this inquiry in the above definition is that which defines an *ex post facto* law as one which increases the punishment which the law imposed on the crime when committed and which deprives the accused of a substantial right.

Appellee submits initially that there has been no substantive change in the law by virtue of the 1939 amendment. Under the law, as originally enacted, the Board of Prison Terms and Paroles was authorized to establish conditions of parole and was authorized to return a convicted person to confinement at its discretion. It had no power to terminate the sentence imposed by

the court, nor was it given that power by the 1939 amendment. As a practical matter, the Board might have made the conditions of parole so light as to maintain merely nominal control over the parolee. Nevertheless, by law the Board could never, under the Act of 1935, completely discharge the parolee until his maximum sentence had expired or he was pardoned by the Governor. The 1939 Amendment simply states what was part of the existing law by necessary implication. It merely sets forth a standard to guide the Board in determining the fitness of an applicant for parole. Briefly, appellee submits that there has been no change in the law sufficient to violate the *ex post facto* prohibition of Article I, section 10 of the Federal Constitution.

Assuming for this argument, that the 1939 amendment effected a substantive change in the law relating to parole, appellant has still not stated any grounds for the invocation of Article I, section 10. Parole has long been considered by the courts of the State of Washington to be a privilege and not a right. See *In re Pierce v. Smith*, 31 Wn. (2d) 52, 195 P. (2d) 112; *In re Grieve v. Smith*, 26 Wn. (2d) 156, 173 P. (2d) 168; *Fathers v. Smith*, 25 Wn. (2d) 896, 171 P. (2d) 1012; *State ex rel. Linden v. Bunge*, 192 Wash. 245, 73 P. (2d) 516. In *Milliken v. McCauley*, 20 F. Supp. 202, the District Court held, in construing the precise statute now under consideration, that parole is a matter within the discretion of the Board of Prison Terms and Paroles.

In *People ex rel. Kurzynski v. Hunt*, 25 F. Supp. 647, the laws of New York State relating to revocation of paroles were altered after petitioner's conviction and confinement. The court said:

“ * * * When petitioner was accorded this privilege and was released on parole, he took it with conditions thus attached to it by law, including the method then provided for determining parole violations. There was no constitutional guaranty when sentence was imposed upon petitioner that the provisions regarding parole and for determining violations thereof would remain constant. The only constitutional inhibition was that no law would be passed that would increase the punishment for the crime he had committed. *Malloy v. South Carolina*, 237 U. S. 180, 184, 35 S. Ct. 507, 59 L. Ed. 905; *Duncan v. Missouri*, 152 U. S. 377, 382, 14 S. Ct. 570, 38 L. ed. 485.”

The United States Supreme Court cases cited by the district court in the above quoted opinion are themselves analogous and, respondent believes, controlling in the present situation. In the *Duncan* case the Court held that a change in the court procedure by the abolition of certain courts existing at the time of the commission of the crime and creation of new ones under which the appellant had been tried was not *ex post facto*. In the *Malloy* case it was held that a change in the punishment for murder from death by hanging to electrocution did not render the statute repugnant to the *ex post facto* clause of the United States Constitution. The rationale is clear: a procedural change with no accompanying substantive charge is not within the *ex post facto* prohibition.

The penalty for the crime for which appellant was convicted and sentenced has at no time material to this case been increased. The punishment was confinement for twenty years. In order to prevail, appellant must show that there has been such a change in the law between the commission of the crime and the sentence therefor as to subject him to an additional penalty. This has not been shown. It is appellee's position, therefore, that even had the laws relating to parole been so amended

as to render the terms and conditions of that privilege more onerous, there has been no deprivation of a *right* within the intendment of the *ex post facto* provision.

CONCLUSION

The order of the district court should be affirmed for the reasons that it is without jurisdiction to issue a writ of habeas corpus in this matter inasmuch as the appellant has failed to exhaust his remedies under the state procedure for the granting of such writ; that he has not been discharged from the judgment under which he is now confined; and that he is not now confined in violation of the *ex post facto* provisions of Article I, section 10, of the Constitution of the United States.

Respectfully submitted,

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Attorneys for Appellee.

No. 12468

United States
Court of Appeals
for the Ninth Circuit.

HERBERT WINDSOR and BAEDA E. WIND-
SOR, husband and wife,

Appellants.

VS.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

MAY 4 - 1950

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States
District Court for the Northern District of
California

WINDSOR,

Plaintiff,

vs.

YOSEMITE PARK & CURRY COMPANY

and

UNITED STATES OF AMERICA,

Defendants.

Before: HON. HERBERT W. ERSKINE,
Judge.

REPORTER'S TRANSCRIPT

Tuesday, July 12, 1949

Appearances:

For the Plaintiff:

PERRY P. YOHE, ESQ. and
CAMERON L. LILLIE, ESQ.

For the Yosemite Park & Curry Company:

M. B. JACKSON, ESQ.

For the United States:

DANIEL C. DEASY, JR., ESQ.,
Assistant United States Attorney.

(A motion to dismiss on behalf of the Yosemite Park & Curry Company was granted by the Court, after which the following proceedings were had:)

Mr. Lillie: Are you ready to proceed, Your Honor?

The Court: Yes.

Mr. Lillie: We have certain stipulations that the Government and the plaintiff will enter into. The Government has here a scale drawing of the place where the accident occurred which we would like to introduce in evidence as——

Mr. Deasy: This drawing is made by the Office of the Park Engineer at the Yosemite Park. The date is not on here, but it was made shortly subsequently to the occurrence of the accident, Your Honor. The drawing is in two sheets here, blueprints, and is of the place where the accident involved in this case occurred.

Mr. Lillie: We will stipulate that it may go into evidence as an exhibit, Your Honor.

The Court: It is a drawing.

Mr. Deasy: Yes; two sheets or blueprints.

The Clerk: That will be plaintiff's Exhibit No. 1.

(Two sheets of blueprints were thereupon marked Plaintiff's Exhibit No. 1 in evidence.)

The Court: What is the date of this alleged accident?

Mr. Lillie: June 21st, 1947. We also offer, Your Honor, six photographs showing and integrating different portions of the porch and the step from which the plaintiff fell as next exhibit in order.

Mr. Deasy: I might state these photographs were

also [2*] taken by the personnel of the National Park Service, Your Honor, at Yosemite.

The Court: They will be Plaintiff's Exhibit 2 through 7 in evidence.

(Six photographs referred to were thereupon marked Plaintiff's Exhibit No. 2 through 7 in evidence.)

Mr. Deasy: Counsel, will it be stipulated that at the conclusion of the case the Government may withdraw these exhibits?

Mr. Lillie: So stipulated.

Mr. Deasy: Also the next one which you are about to offer?

Mr. Lillie: Yes; we will also offer as the next exhibit in order for the plaintiff a contract—it is a copy of the contract between the Government and the Yosemite Park Company, I believe, who operated the concession.

(Copy of contract was thereupon received in evidence and Marked Plaintiff's Exhibit No. 8.)

Mr. Lillie: We will also offer and there is no objection to the offer, Your Honor, two letters addressed to Mrs. Windsor, the plaintiff, one dated October 11, 1947, from the Roslyn Medical Group, and the second one dated October 31st, 1947, from the Lewis Memorial Hospital at Yosemite National Park.

* Page numbering appearing at top of page of original Reporter's Transcript.

(Two letters, 10/11/47 and 10/31/47, respectively, were thereupon received in evidence and marked Plaintiff's Exhibits No. 9 and 10.) [3]

Mr. Lillie: The next exhibit is a little bulky, Your Honor. It is a replica of the step and the platform which the plaintiff now offers in evidence.

Mr. Deasy: This is offered for the purpose of illustration, is it?

Mr. Lillie: That's right; for the purpose of illustration.

Mr. Deasy: It is made by the plaintiff, is it?

Mr. Lillie: Mr. Windsor, who is in the United States government service, yes.

(Model referred to was thereupon marked Plaintiff's Exhibit No. 11 in evidence.)

The Court: What are those two letters? Do they deal with injuries?

Mr. Lillie: Yes, Your Honor. Instead of medical testimony, why, those letters are offered.

It is also stipulated between the Government and the plaintiff that if Mr. Cecil J. Doty, who is the regional architect for the Park Service Bureau, 180 New Montgomery, were called upon to testify, that he would testify that at the time of the accident in question and at the time the buildings were built there was in existence a building code adopted by the United States Department of the Interior for National Park Service and on that testimony we offer the building code in evidence.

Mr. Deasy: As to the code itself, Your Honor, I

enter into the stipulation with counsel as to what Mr. Doty would testify; [4] however, I object to the admissibility of the building code on the ground that no proper foundation has been laid and it is incompetent, irrelevant and immaterial as far as the defendant United States is concerned.

The Court: In what respect has not the foundation been laid if Mr. Doty would testify:

Mr. Deasy: My understanding is he would testify that this building code, copy of which has been offered in evidence, was in existence at the time and that it was used in connection with buildings at the Yosemite Park. But whether the matter has any statutory operation for it, or has any binding effect as though it were a regulation adopted under a statute of the United States, I am not familiar with that, Your Honor, never having heard of this code until recently.

Mr. Lillie: Might I call the Court's attention to the title on the outside of it. This is United States Department of Interior, National Park Service, recommended building code, revised August, 1935, report of building code committee.

The Court: I will overrule the objection and admit it.

(The building code was thereupon received in evidence and marked Plaintiff's Exhibit No. 12.).

Mr. Lillie: I might state to Your Honor that counsel for the government and the plaintiff have

stipulated that a progress report of a doctor who was a doctor in the city of San Francisco is to be forwarded to both of us by an uninterested third [5] party, the Yosemite Park Company. The plaintiff in this case was examined as of yesterday and when the progress report comes both counsel and myself have stipulated that it may be offered in evidence.

Mr. Deasy: For whatever it is worth to Your Honor. That is the report of the doctor employed by the Yosemite Park & Curry Company in recent days.

Mr. Lillie: Yes. I think the examination was yesterday.

Mr. Deasy: Yes, we have no objection to its being received in evidence.

Mr. Lillie: To facilitate the trial, if the Court has no objection, I should like to read into the record the pertinent portions of the building code that the plaintiff believes are pertinent to its case.

The first section is No. 3302. It is on page 186 of the building code, under chapter 33.

(Reading.)

The next section is Section 3305, on page 183 of chapter 33.

(Reading.)

The next portion is not material but we would like to call the Court's attention to Section 3306 of chapter 33 on page 183.

(Reading.)

The next section that plaintiff believes is pertinent, Your Honor, is Section 3307 of chapter 33, page 183.

(Reading.)

I should like to call the plaintiff, Mrs. Windsor.

BAEDA WINDSOR

the plaintiff, called in her own behalf; sworn.

Direct Examination

By Mr. Lillie:

Q. Where do you reside?

A. 118 Laurel Drive, Altadena, California.

Q. On or about January 21, 1947, do you recall an accident occurring——

The Court: You mean——

The Witness: June.

Q. June 21, 1947,—to you in Yosemite Park?

A. Yes.

Q. Will you tell the Court just what happened and the circumstances leading up to it?

A. My husband and son and I were on a vacation and we went to Yosemite, driving, and we arrived there in the evening, about dusk, or twilight, and we drove around for a while looking for a campsite, a place to stay, and it started to get darker.

My husband stopped in one place and inquired about some place for us to stay and spend the night. As it proceeded to get darker, we decided we better get something to eat. We hadn't had any dinner,

(Testimony of Baeda Windsor.)

so we drove over to what is called the Lodge, with the cafeteria. We went in there and had dinner.

After we had finished our dinner, my son went out ahead of us and my husband stopped to pay the bill and to pick up a little meat for our dog, who was in the car. Then I went out in front of [7] my husband and I walked across the platform toward the car and it was dark; it was very dark at that time and no lights out there.

The Court: What time of night was that?

A. It was about 8:00 o'clock.

The Court: All right.

A. When I came to the edge of the platform, ready to step down, something made me lose my balance, either the edge of the platform, some rough place, I couldn't see, and I lost my balance and I went to try to catch myself, I reached out instinctively for something to catch onto, and there was nothing there, no rail, no anything, and I stepped down first with my right foot and then quickly with the left, and as I stepped—at the bottom the bone in my left ankle cracked and there was a terrific pain shot through and I caught myself on the other foot in exactly the same sort of step and that cracked and then I went over into the gutter.

The Court: I am somewhat familiar with that Yosemite Lodge. There is a cafeteria there, a long porch.

Mr. Lillie: That is correct.

The Court: The lodge has a cafeteria and you

(Testimony of Baeda Windsor.)

walk in the door and go around by the cafeteria to get your meals and you come out and pay the cashier and then go out through the door and there is quite a broad porch there and people sit there and so forth; quite a long porch. [8]

Mr. Lillie: That is correct.

The Court: There is a rail on that. In the middle of it is a couple of steps down there onto the ground, as I recollect it. Is that what you were doing, going along that porch?

Mr. Lillie: I think, if the Court please, after the porch there is an extension of another platform and on that platform the cars park now. There are two steps down as indicated by the pictures.

The Court: Let me see the pictures. Referring to Plaintiff's Exhibit 4, that shows the porch that I had reference to, not the porch where you get into your car.

Mr. Lillie: That is correct.

The Court: The porch above there.

Mr. Lillie: Yes.

The Court: Which porch were you walking on, the porch above or the lower one there?

A. Well, the lower platform—I don't specially remember where I came down from toward, but it was on this platform that I angled across toward the car this way, over in this direction, as it was on this platform that I lost my balance, (indicating).

The Court: For the record, the witness pointed

(Testimony of Baeda Windsor.)

to that part of Exhibit 4 which shows the porch immediately above the words "Park for reservations."

Mr. Lillie: I show you two shoes, Mrs. Windsor. Are these the shoes that you were wearing? [9]

A. Those are the shoes I was wearing.

Mr. Lillie: May these be introduced in evidence?

(The pair of shoes referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 13.)

Q. (By Mr Lillie): Will you step down to Plaintiff's Exhibit No. 11 and indicate to the Court where you lost your balance and what occurred thereafter?

A. I think the cafeteria was over in this direction, and I walked over across the platform to here.

Q. Indicating the top portion of the Exhibit 11, the wooden portion?

A. Yes. That is where I lost my balance and there was nothing to catch and it was dark and I couldn't see and there was—that came out afterward—I couldn't see that there was a rough spot there. So that is where I lost my balance, and I came down with my right foot and tried to catch myself and then with my left foot; crossed that dark place and hit this uneven place on the gutter at the bottom.

Q. Whereabouts did your left foot hit the gutter, do you know?

(Testimony of Baeda Windsor.)

A. Yes. It was sort of bent right back, right in——

Q. Your foot hit here. Do you know what portion of it?

A. I hit about the center of the foot and the heel went back there.

Q. Into the ridge? A. Yes. [10]

Q. Indicated on the exhibit?

A. Yes. Then, of course, I caught myself quickly; I had to, quickly, and with very much force on the other one and then that cracked the right one.

Q. We have you where you have fallen to the ground, the pavement. Will you tell the Court what happened after that?

A. Well, I was suffering considerably from shock as well as the terrific pain in the ankles and for a moment I thought I was going to faint. I asked for some water. Someone brought me some water and my husband asked if I could get up. I said, "No, I can't move," and several other people came around. I was a little frightened for fear they were going to try to pick me up and I knew it was serious; I did not want to be moved, so I said, "Don't touch me until someone comes," and I don't know who called for the doctor and the ambulance but finally the doctor and the ambulance came and the doctor examined the ankles right there before he moved me and then they put me on the stretcher and in the ambulance and took me to the Lewis Memorial Hospital.

(Testimony of Baeda Windsor.)

There they took me into the room, into the receiving room, and Dr. Sturn, that was his name, and the nurse took X-rays and discovered the bone was broken in each ankle, and they painted the ankle and leg with some brown liquid, I don't know what it was, and put bandages on and then made up a plaster cast and covered all of it from the toes. They just left the toes sticking out, up to just below the knee on the plaster cast on both [11] legs.

Q. How long did you remain at the hospital?

A. Well, it was two nights and an extra day.

Q. What was your condition while you were there?

A. Well, it was very, very painful. They gave me some sedatives so that I could sleep and with both ankles involved, it was very difficult to move. I didn't move at all without the help of a nurse.

Q. By "moving" you mean moving in bed?

A. Yes, moving in bed. Of course, I was in bed.

Q. Then what occurred after the two days and the two nights in the hospital?

A. Then they put me in our car and the suffering was very great because the movement of the car would shake me and the ankles ached continuously all the way home; that took about 12 hours. We left there about 10:00 and arrived home about 9:00 in the evening.

Q. What occurred after you got home?

A. Well, when we got home, why, they carried me into bed and there I stayed for six weeks with

(Testimony of Baeda Windsor.)

the exception of an hour or so after the first few days. I stayed in bed right there. Then they got a wheelchair and we improvised a system, because we felt we could not afford two nurses, to lift me from one place to another; we worked out a sort of bridge from the bed to the wheelchair and I would turn myself with the help of the nurse [12] and would back across this little bridge onto the wheelchair so I could have a change of positions.

Q. How long were you in that condition, did you say six months? A. Yes, six months.

Q. During that period of time were the casts on your legs? A. They were on continuously.

Q. You could not walk?

A. Oh, no, I couldn't walk; I couldn't stand.

Q. Subsequent to that, what happened? What happened after that?

A. Well, before the six weeks were up, it was about two weeks after I came home, we had an X-ray technician come up to take some more X-rays to see how the bones were healing and they said that was satisfactory. Of course that was just the beginning of the healing process and then we continued on the same way for six weeks.

Q. After the six weeks what occurred?

A. Then my husband took me down in the car to Dr. Williams. He is the orthopedic surgeon, I think he is called, at Roslyn Clinic, and he took the casts off. Then they wheeled me into the X-ray room where they took more X-rays. After the

(Testimony of Baeda Windsor.)

X-rays they bandaged both legs tightly and we went home.

Of course, Dr. Williams told me to be very careful. I would [13] have to start out very easily, just to learn to move at first, and there was a great deal of swelling. My feet were very, very thin after the casts came off, but they started swelling after I started putting my feet down.

Q. During that six weeks' period and up until the time that you are testifying about now, was there any pain and suffering in respect to this?

A. Oh, yes. The healing process was agonizing at times. That was not continuous, but I would wake up at night and I could not sleep.

Q. After you got home with the cast off, did you then proceed to walk around normally?

A. Oh, no. I had to learn to stand first. I would hold onto something. I would brace myself with both hands just to start and learn to stand first. I had to do that first and only for just a few seconds at a time and then I would rest and as days went on I would take a few steps. I used the wheelchair for a couple of weeks, anyway.

Q. That is after the six weeks' period?

A. Yes.

Q. So after the wheelchair, did you use something else? A. I beg your pardon?

Q. Did you use anything other than the wheelchair?

(Testimony of Baeda Windsor.)

A. After I started to take a few steps I used the wheelchair to push in front of me and then after we sent the wheelchair [14] away I used my chair, a small chair with a back to it, so I could hold onto it and feel more secure. Of course, it was very painful and they swelled up all the time. It was like learning to walk, but I knew I had to try to do it if I was going to walk again.

Q. How long a period of time did this go on?

A. Well, that went on for several months excepting that there was improvement as it went on.

Q. After the six weeks' period for several months you proceeded that way; is that right?

A. Yes.

Q. Was that under the direction of your doctor?

A. Yes. He said to be careful, and also I had massages and the X-rays and I exercised the ankles even though it hurt to move them, but I kept twisting it up in a rotary fashion, like that.

Q. Is there any noticeable effect by reason of the accident in respect to your ankles?

A. Yes, there is, because I cannot stay on them for any length of time and they tire very, very fast.

Q. How long would you say?

A. Well, I know I can't stand in one spot for as long as half an hour and I don't think I can do that. Then I have to sit down when I even wash dishes.

Q. Well, what occurs that makes you sit down?

A. They start to ache and they swell up so I go and sit down because I just can't stand any more.

(Testimony of Baeda Windsor.)

Q. After a period does the swelling go down?

A. It goes down. I usually elevate my feet. I sit down some place where I can put my feet up upon a stool or something.

Q. Prior to this accident—I notice you have flat shoes on—were those the only type shoe you wore?

A. No. I usually wore high heels and all stages in between, but I can't wear high heels any more; I can't bend my foot and I notice in particularly in a ramp now in walking, I can walk along and when I come to a ramp that is, well, even a slight bit elevation going down, I have to really have something to hang onto because they don't seem to want to bend enough forward to walk down.

Q. In other words, your foot doesn't bend as much as it did previously?

A. No. It is not as flexible. It won't bend.

Q. You notice any lack of flexibility or any difference in your walking now as compared to before the accident?

A. Yes. I used to step in a sprightly fashion because I am accustomed to walking fast and now I have to walk slowly.

Q. Did you ever dance prior to your accident?

A. Yes. In my younger days I did some fancy dancing. I could bend my feet way over, but I can't do anything like that, I haven't the flexibility now. I always went to parties and they [16] started to have a little square dancing—I did that recently and I thought maybe I might try to join in that, but I could not because I can't slide sideways at all.

(Testimony of Baeda Windsor.)

Q. You hired one nurse, your husband a nurse, is that correct? That was during the six weeks' period? A. Yes.

Q. Then you dispensed with the nurse?

A. Yes. I also had some help, I had household help, in by the day. I couldn't do any of the usual things that I did.

Q. How long a period did you have that household help?

A. Well, I had one come in every day for about two months and then after that occasionally.

Q. How frequently?

A. Well, about twice a week.

Q. Over how long a period after the two months?

A. That was several more months; about three or four months.

Q. About three or four months you had somebody come in twice a week? A. Yes.

Mr. Lillie: You may cross-examine.

Cross-Examination

By Mr. Deasy:

Q. The accident happened on June 21st of 1947?

A. That's right.

Q. You said, I think, about 8:00 o'clock in the evening? A. Yes. [17]

Q. The place where the accident happened was in the Yosemite Park? A. That's right.

Q. You were walking by yourself, were you, at the time? A. By myself.

Q. Your husband was coming out behind you?

(Testimony of Baeda Windsor.)

A. Behind me.

Q. By the way, was the boy with you at that time?

A. No; the boy went out ahead to see the dog in the car.

Q. The car was parked up against this platform?

A. Yes; facing it.

Q. Were there other cars similarly parked at that time?

A. I know that there was another one because I tried to lean against it while waiting for the ambulance; I leaned partly against the big step.

Q. There was another car there and not your own that you leaned on?

A. There was another car, not our own, but ours was on the other side; it was between the two cars.

Q. You were walking along—isn't it a fact that you turned, or you stepped before you fell—you did not walk right up to the edge of that platform, did you?

A. I hesitated only enough to make a step.

Q. You realized that there was a step there, did you?

A. Oh, yes; I knew there was a step there but it was not clear, [18] it was dark; there were no lights out there.

Q. Isn't it a fact that you were standing with your back turned toward the step and that you took a step backward and fell?

A. Oh, no, no. I would have broken my back if

(Testimony of Baeda Windsor.)

I had gone over backward. I never walked backward.

Q. When you came down the steps from the porch of the cafeteria—there is a porch there?

A. Upper part.

Q. And you came down some steps to get onto the platform where the accident happened?

A. Yes.

Q. That is a sort of sidewalk there, isn't it?

A. I think so, but I don't have a real recollection of that upper part.

Q. The lower part, I mean; you come down off the porch of the cafeteria onto the sidewalk?

A. Yes; that is wooden.

Q. You did not cross right out directly from the step, you came down the step, you didn't walk right over to the edge?

A. I angled over toward the car.

Q. In the direction where your car was?

A. Yes.

Q. You were wearing these shoes which have been introduced in evidence; is that right? [19]

A. Yes. I always wear shoes like that where we do any amount of walking; I wear shoes like that then.

Q. Sort of moccasin? A. Yes.

Q. What part of your shoe hit on this roughness that you spoke of on the platform?

A. The top part, you mean?

Q. You said your foot caught and that caused you to lose your balance.

(Testimony of Baeda Windsor.)

A. Yes; something caused me to lose my balance. I couldn't say what. Subsequently we saw the condition of the step but I couldn't see that at the time.

Q. The edge of the platform is sort of chewed up?
A. Yes, from cars.

Q. From bumpers?
A. Bumpers.

Q. After you fell you looked, did you, to see, or your husband looked to see what had caused you to fall?

A. Yes, he examined that thoroughly. Of course, I didn't—I was in terrific pain down there. I was only interested in getting to the hospital.

Q. So actually you didn't know what it was, of your own knowledge?

A. I didn't actually then because I couldn't see.

Q. You don't know actually of your own knowledge, do you, whether [20] a nail was protruding out through the wood that your foot could have hit on?
A. I couldn't answer that.

Q. It may have been a knothole in the wood, or just what the condition was you don't know?

A. No; I couldn't answer what actually caused me to fall but it was like stepping off into space. I did my best to catch myself and that is what happened.

Q. I understood you to say that you were accustomed to wearing high heels before the accident and you have been unable to wear them since then.

A. That's right.

Q. Did you customarily wear high heeled shoes?

(Testimony of Baeda Windsor.)

A. Not all the time. There is a medium heel for walking like where you give it real rough wear in the national park, then I would wear shoes of that type.

Q. Had you ever been to Yosemite Park before?

A. No; I had never seen the park before.

Q. You had been accustomed to visit other national parks, had you?

A. Other national parks, yes.

Mr. Deasy: I think I had no further questions.

The Court: It is 12:00 o'clock now. We will take an adjournment until 2:00 o'clock.

(Thereupon an adjournment was taken to 2:00 o'clock p.m.) [21]

Afternoon Session, Tuesday, July 12, 1949, 2 P.M.

Mr. Lillie: I would like to call Mr. Windsor.

HERBERT D. WINDSOR

called as a witness in his own behalf, sworn

The Clerk: Will you state your name, sir?

A. Herbert D. Windsor.

Direct Examination

By Mr. Lillie:

Q. Mr. Windsor, where do you reside?

A. 118 Laurel Drive, Altadena, California.

Q. You are the husband of the plaintiff, Mrs. Windsor? A. That's right.

(Testimony of Herbert D. Windsor.)

Q. And what is your occupation?

A. Civil Engineer with the United States Government, Corps of Engineers, the Army.

Q. How long have you been employed in that capacity? A. Approximately 14 years.

Q. And prior to that, what was your occupation?

A. I was an architectural engineer in Chicago.

Q. For how many years did you hold that position? A. Ten years.

Q. Now, what schooling have you had?

A. Graduate architectural engineer, Chicago Technical College.

Q. And were you present at the time of the injury to your wife on June 21, 1947?

A. Yes. [22]

Q. And will you relate substantially what occurred at that time?

A. Well, as—starting from the time we came out of the cafeteria?

Q. That will be sufficient.

A. Coming out of the cafeteria I delayed back a little to—I got a few scraps from the cook.

Q. Pardon me just a minute. We can assist the Court and counsel here—I would like to show you Plaintiff's Exhibit 1 and ask you whether or not you have seen this before? A. I didn't get it.

Q. Have you seen this before?

A. Yes, just a few minutes ago.

Q. You looked at it, did you not? A. Yes.

Q. And as an engineer you understand the reading of this plan? A. Yes.

(Testimony of Herbert D. Windsor.)

Q. Now, can you show the Court approximately, on the day in question, where you parked?

A. I can only be approximate. It was down in this end of the platform, away from the cafeteria; the cafeteria was up here, (indicating) and we were maybe about a third or fourth car from the end of it. As the car strips were about 6 or 7 feet, we would be in the neighborhood of 25 feet from the end, in this—right in about there. (Indicating)

The Court: Let the record show he refers to Exhibit 1 on the left side at the upper corner about where the gutter is.

Mr. Lillie: That is correct, Your Honor.

Q. Now, then, will you show us where the cafeteria is?

A. Down at this end, this end of the platform, the little doorways go in there and in that way you come out in the double doors.

The Court: Pointing to the left end of the top of the drawing of Exhibit 1 which has the word "cafeteria" on it.

Q. Now will you note that portion of the drawing, or drawings marked Section CC, can you identify that as a side view of the wooden platform, the concrete step, the gutter part and the porch steps and the lodge porch?

A. Yes, that part of the steps in the lodge platform, but not at the spot where "CC" is back closer to the cafeteria where we came down would be more like over toward this end, more like "DD."

(Testimony of Herbert D. Windsor.)

The Court: Did you walk all the way along that wooden platform, the lodge porch, after you left the cafeteria, walk along the lodge porch until your wife fell, went down on the wooden platform?

The Witness: Yes, sir, we crossed this porch and I can't say definitely, I don't remember which set of steps we came down, there are three steps coming down from that porch.

The Court: From the lodge porch to the wooden platform.

The Witness: Then we angled across—to the best of my [24] recollection I would say we came there and angled across.

The Court: You came down from the lodge porch to the wooden platform of the set of steps that your wife did?

The Witness: Yes, sir, I did; I was directly behind her.

The Court: Then you came down those steps and angled, your car was angled against the wooden platform?

The Witness: Yes, sir.

The Court: Against that cement?

The Witness: Right against the block.

Q. (By Mr. Lillie): Mr. Windsor, on this map can you ascertain whether or not there is a cross-section other than "CC" in respect to the wooden platform on the side view?

A. Yes, this "DD" section is closer to the scene of the accident. The section "DD" is down towards

(Testimony of Herbert D. Windsor.)

this end and is much closer where the scene of the accident occurred.

Mr. Lillie: For the sake of the record we are pointing to a side view specifically set out as Section "DD" in the lower left hand corner of Plaintiff's Exhibit 1.

Mr. Deasy: May it appear that all the witness' testimony has been directed to drawings appearing on the first page.

Mr. Lillie: That first page of the plaintiff's Exhibit 1.

Q. Now, keeping that section in mind, can you determine from the drawing what the depth is from the top of the wooden platform to the top of the first cement step?

A. Yes, the dimensions were, the dimension line from the top [25] of the concrete up to the top of the platform, and it varies from 7 inches to 8 inches on that distance, and then if you want to drop down from the concrete, from the concrete down on to the pavement, down to the bottom of the gutter, there is a dimension line there, an arrow pointing to it which varies from $7\frac{1}{2}$ inches to 12 inches. From the concrete, top of the block, to the bottom of the gutter and then at the bottom, the depth of the gutter varies from one inch to two inches, width from 6 to 10 inches.

Q. Now, at the time, or immediately after the accident, did you go back and look at the platform, the gutter and the cement step where your wife had fallen?

(Testimony of Herbert D. Windsor.)

A. Yes, sir, the very next morning my son and I went back. We approximated the exact location where our car was parked and I marked off the heights there at that time and we inspected the steps and the platform very carefully and I marked them off, because at a glance I could see the irregularities and the variance of the height and due to my experience in designing stairways, without measuring I could see that the stairways, the steps were not properly designed and so I wanted to get the correct measurements of the steps so I could reproduce it all on drawings.

Mr. Lillie: You may sit down.

Mr. Deasy: I move to strike the portion of the witnesses's answer "he knew it wasn't properly designed, he could see it [26] wasn't"——

The Court: Not responsive in the first place. It may go.

Q. (By Mr. Lillie): Mr. Windsor, how much did you find the variance in the distance from the top of the cement step to the gutter, bottom of the gutter in that area?

A. I checked it about three places and there was variation, say in the height there from about $9\frac{1}{2}$ to over 10; it would vary from $9\frac{1}{2}$ or 10 probably $10\frac{1}{2}$ inches variance in the three places I checked.

Q. That—page 1 of section "DD" showing a variance——

The Court: $7\frac{1}{2}$?

Q. $7\frac{1}{2}$ to 12——

(Testimony of Herbert D. Windsor.)

A. It could be, at different locations it varied.

Q. Well, in your experience as a civil engineer and an achitectural engineer, have you had occasion to design steps, different types, stairways?

A. Yes, sir, I have designed many steps and stairways on the drawing board, in all plans for buildings.

Q. For how many years?

A. Well, I was employed in Chicago for 10 years and worked on all types of buildings and in that capacity I designed and detailed stairways and steps, not specializing on stairways, but that was part of my duties.

Q. You are familiar with the usual standards used for an architectural design for steps? [27]

A. Yes, sir.

Q. Can you tell the Court what they are?

A. Well, we have variable rules for designing stairways, but I would say our first rule is that all the risers must be an equal height, and we have one rule that twice the rise plus the run must be in the neighborhood of 25 inches. I will give you an example of that—that is an old fashioned rule—if you start $7\frac{1}{2}$ inches you take and double that, 15, and add 10, you get 25 inches. That is a kind of rule of thumb you use to design, to see that your stairs are comfortable.

Then you have another rule that the riser times the tread will equal in the neighborhood of 75 inches. That will work for a 10, and a $7\frac{1}{2}$ inch

(Testimony of Herbert D. Windsor.)

rise, would give you that; $7\frac{1}{2}$ inch rise times the 10 inch tread would give you 75 inches. That is another rule. And then we checked them in varying rules; and these considered, we would never design a step with a greater rise than $7\frac{1}{2}$ inches for any stairway.

Q. Well, did you have occasion, or is it customary to design steps where the risers will be of different dimensions?

A. No, that is the fundamental rule in all stairway construction, that the risers must be equal height and all uniform risers in any one run of a stairs, in all the buildings I have ever encountered. They will allow you, due to the inaccuracies of construction—some call for 7 to $\frac{3}{16}$ ths of an inch tolerance, there is no such thing as getting them identical, and you strive [28] for that, of course, in your construction. But there is inaccuracies of construction because they have, they know through tests of years of experience, people in taking the first step, something seems to cloud in their mind, they expect the next drop to be the same as that one they have taken the first time going down. They kind of, or intend to shift their weight to balance so that they will meet the next step at that time.

Q. Well, as an engineer having seen these steps, do you have an opinion in respect to the structural design of them? Now, I just asked you whether you have an opinion.

A. Yes, I have an opinion that they are not.

(Testimony of Herbert D. Windsor.)

Q. Wait—— A. Pardon me?

Q. Will you give us that opinion?

A. Well, based on my experience in architects' and engineers' offices and in designing stairways, I can tell you that those steps are improperly designed and I would say in my opinion that no architect detailed them. That is, in my opinion, I would say they were not detailed by an architect. When they were constructed but maybe—you know just how certain things get built with the carpenter with no architect designing them. No architect I have ever heard of would put his name below a drawing and say that is the design of a step because he has certain responsibilities.

Q. Well, is your opinion based on the fact that the ditch ran parallel with that last step? [29]

A. That is one of the bases for my opinion. There are several others.

Q. What are the others?

A. Well, the other is the varying height of the riser. The risers must be of equal height. We have to start with that on any stairway, and the condition of the edge of the platform, you must have a solid footing when you shift your weight to go down a step, you put all your weight on one foot, and if you haven't got a level surface, when the surface receives that weight you must have a level surface to receive it at the bottom so that the—the gutter causes that irregular surface and your weight is coming down on one end so that alone—. And then,

(Testimony of Herbert D. Windsor.)

of course, is the inadequacy of lighting because if there is a hazard there and you can't see it to exercise the greater caution, you can't see it distinctly, you are at a disadvantage in that respect.

Q. Well, let us go on to the time of the accident, when you left the cafeteria with your wife. How far ahead did she precede you?

A. Well, I should say—you can't be exact on that—but maybe about, well, I would say that about 3 or 4 of my steps which would be in the neighborhood of ten feet, 10 or 11 feet ahead of me.

Q. And did you keep your eyes upon her as she walked along the platform?

A. Yes, I kept my eyes pretty well upon her. [30]

Q. And in other words, you were facing her?

A. Yes.

Q. Her front or where?

A. She had her back to me, she was proceeding ahead of me at the same rate.

Q. You were facing the direction she was going?

A. We were walking in single file, only I was 3 or 4 steps to the rear.

Q. And was it light or dark out or was it——

A. No, it was dark. This was down in the canyon at Yosemite and at 8 o'clock at night there it is pretty dark, so in the steps—there was no artificial light that was reflected on the steps.

Q. None whatsoever?

A. There was some light inside of the curio

(Testimony of Herbert D. Windsor.)

store, the cafeteria, you get some reflected light through the window, but it was in shadow pretty much of it, it varied, the lights were very dim.

Q. Did it reflect out to the wooden platform at all?

A. Well, as to the extent of the reflection it no doubt would partially, but not very greatly out that far; and the cafeteria was closing up at the time and they had turned out quite a number of their lights and there wasn't a great deal of illumination, inside even it was dimly, very dimly lit.

Q. Was it sufficient that you could see the steps?

A. You could see the steps in outline only. [31]

Q. That is all? A. Yes, no details.

Q. Will you tell us just what occurred?

A. Well, I was conscious of my wife slipping there at the top of the step. Just as she started down I was conscious that she reached her arm out as though losing her balance to try to stop herself. Well, I saw her come down real quick and then take another step down real quick. I heard her groan and then I saw her put the other foot down and slump to the pavement. It all happened pretty quick because I just froze to the spot. I didn't have time, I couldn't get to her—you know how that is when something like that happens, I couldn't reach her. She just slumped to the steps, so I reached over to her and I tried—I asked her if she could stand at all. I was going to pick her up. She was right down

(Testimony of Herbert D. Windsor.)

at the bottom of the step in the gutter, so I was going to pick her up. I didn't stop to think it would be the wrong thing to do and so she said, no, that I had better not move her, and I could see she was in pretty bad pain. And some people come up and I asked the girl there about a hospital. She said she would call an ambulance up—there was a girl there—call an ambulance and I tried to comfort my wife as much as possible and asked the girl to bring a drink of water and she did that, and we waited there until—I didn't move my wife, just tried to make her comfortable as possible until the doctor came with the ambulance, and he put her—and [32] his helper—put her in the ambulance and drove back to the Lewis Memorial Hospital and I followed in our car and then I went right in there and he put—took my wife in the operating room and examined her ankle. He told me he was sure there were broken bones, but we would have an X-ray. So he took the X-rays before he made any definite decision and developed the X-rays right there and proceeded to show me the broken bones, the break, the left one came at a very diagonal—the break right diagonally down the bone. And it looked kind of bad to me, and the right bone was just broken transversely right straight across. He proceeded to put the bones in a cast there and I talked to him about the breaks and we discussed them and he had never had—I asked him about the two broken ankles. He had never had two broken ankles, a great

(Testimony of Herbert D. Windsor.)

many come in singles, just like that from the ski jumpers would come up and ski and he said he has had about an average of two a day, he was very competent, we got excellent medical attention. I asked him about that more like you want to know a man's experience in setting a bone, and he had experience in the Army.

Mr. Deasy: I object to this as not responsive to the question.

The Court: I don't think you need to go into that.

Q. (By Mr. Lillie): Did you observe at the time your wife stepped off the platform, which direction she was facing?

A. Oh, yes, she had her back to me and was facing the way she [33] was going toward the car and down the steps.

Mr. Lillie: May I have this marked as plaintiff's exhibit next in order for identification only?

The Clerk: Marked Plaintiff's Exhibit 14 for identification.

Q. (By Mr. Lillie): Will you look that over, Mr. Windsor? Did you make any payments in respect to medical care for your wife?

A. Oh, yes. The first payment we had to pay the doctor in the hospital at Yosemite before we left.

Q. And then did you make payments for the rental of a wheel chair? A. Yes, sir.

Q. And also payments for help that was needed around the house?

(Testimony of Herbert D. Windsor.)

A. Yes, sir; and the practical nurse, we got a practical nurse in right away.

Q. And also for the domestic help thereafter?

A. That's right.

Q. And that is expressed on this exhibit, is that correct; you kept a detailed account of it?

A. Yes, I did up to that—that is only complete up to that date.

Q. Did you have any other added expenses other than this?

A. Yes, we have had added expenses. My wife gets massage treatments for her ankles. [34]

Q. That is subsequent to the filing of the complaint? A. Yes, she continues with those.

Q. But up to the time of the filing of your complaint, this is approximately the amount that was spent, is that correct?

A. Yes, that is right at that time.

Mr. Lillie: We will offer this as the plaintiff's exhibit next in order, your Honor.

Mr. Deasy: There is no objection by the Government.

(Whereupon the document above referred to and marked plaintiff's Exhibit 14 for identification was received in evidence.)

Mr. Deasy: I think the record should show this is a memorandum, I assume, prepared by Mr. Windsor.

Mr. Lillie: That is right.

Mr. Deasy: Summarizing expenses that he had incurred, medical.

(Testimony of Herbert D. Windsor.)

The Witness: That is correct.

Mr. Deasy: And you prepared this prior to the filing of the complaint in this action?

Mr. Lillie: I think this was prepared subsequent.

The Witness: Unless—about the same time it runs up——

Mr. Lillie: \$601.21—the date, I mean—the date is June 15.

The Court: June 15 of what year?

Mr. Lillie: 1948.

Mr. Deasy: This is an accurate memorandum of the actual expenditures you and your wife incurred? [35]

The Witness: Yes, up to that time.

The Court: You consider it is reasonable?

The Witness: Yes, sir; more than reasonable. We economized in every manner and means.

Q. (By Mr. Lillie): As a matter of fact, there was medical attention that you received for which there was no payment made based on your carrying insurance; is that correct? A. Yes, sir.

Q. And you didn't even ask for the reasonable value of those services, did you?

A. No, sir. We carry group insurance—the only stipulation you have, I had to sign an agreement with them that in the event the expenses are recovered, they charge you the full amount on the claim. I don't know whether you are familiar with them——

Q. That is a matter of \$30? A. Yes.

(Testimony of Herbert D. Windsor.)

Q. And you have included that in the list?

A. Yes, because the other just includes just the regular ones.

Mr. Lillie: The amount shown here, your Honor, is the sum total of \$601.21, and I should like to move the Court to permit the plaintiff to amend the complaint by interlineation by substituting that amount for the sum of \$463.50 heretofore shown.

The Court: That will be granted.

Mr. Lillie: Thank you. That is all. You may cross-examine.

Cross-Examination

By Mr. Deasy:

Q. Mr. Windsor, calling your attention to [36] these photographs, have you seen these photographs which are marked in evidence?

A. No, sir, that is the first time.

Q. Step down and look at them. Just want to ask you if those photographs represent with a reasonable accuracy the conditions existing at the platform in front of the lodge in Yosemite Park at the time of the accident to your wife?

A. Yes, sir, as near as I can tell from photographs.

Q. That is without having reference to the exact point on the platform where the accident happened?

A. I can't state it is in the spot otherwise—

Q. Now, picking one out here, number 4, Exhibit No. 4, shows a portion of the platform and a portion of the parking lot in front, paved parking place in front of the platform, and in the rear of

(Testimony of Herbert D. Windsor.)

the photograph appears a porch with a railing; you observe that, do you? A. Yes, sir.

Q. Now, in your previous testimony with reference to stairs, you were referring were you to what appears to be a wooden platform and then below that a concrete porch and below that the roadway; is that right?

A. That is right; those steps that you take to get down from the platform to the paved area where the car——

Q. With reference to the length of the platform or the width of it, of what you call the steps, could you estimate approximately [37] how long that platform is?

A. It was very long, probably one hundred feet.

Q. It runs along the entire front of the building, doesn't it?

A. Yes, pretty much so, as near as I can recall. It is a very long platform.

The Court: Past the cafeteria, then?

The Witness: No, I think not. I think it ends just at the end of the porch and the cafeteria is beyond that, but it is—although the cafeteria might come beyond that, around it. There is a curio shop in back.

Q. In giving your opinion previously with reference to whether or not that is a properly designed area, your opinion was given with the assumption that constitutes a stairway?

A. I think the steps you take from the platform

(Testimony of Herbert D. Windsor.)

down, you must go down those steps to get in the car.

Q. To get to the street?

A. The pavement, to the car.

Q. Isn't it, as a matter of fact, the top porch which is composed of wooden planks, two by twelve inches in size, constitutes a sidewalk in front of the building? You come down a flight of steps, three flights of steps from the porch of the cafeteria building down on to this wooden walk; isn't that right?

A. That's right, that is a walk-way, a platform; I referred to it as a platform.

Q. It is, in fact, isn't it, Mr. Windsor, a sidewalk in [38] front of the building?

A. I would have to think about a definition of a sidewalk. I think the porch up above was used as a sidewalk, although a sidewalk ordinarily is not elevated and this was elevated two steps, so I would rather call it a platform rather than a sidewalk.

Q. It is similar in construction, is it not, to sidewalks in other areas where there are considerable winter snows?

A. I have never had an occasion to see a condition like that, but I imagine there could be the same type of sidewalk for that if you want to refer to it as that, but as to its—a platform, it is up maybe 18 inches above the paved area.

Q. That is above the general area where automobiles are parked?

(Testimony of Herbert D. Windsor.)

A. Yes, sir, so you must take two steps to get up there.

Q. At the time of your wife's accident, there were certain portions of that area which were marked off for the parking of the automobiles; isn't that right?

A. Yes, sir.

Q. And in fact you parked your own car there, others were parked there?

A. Yes, sir.

Q. You parked the car at right angles to the length of this concrete bulkhead running along there?

A. That's right.

Q. There were portions of that paved area where, were there [39] not, where parking was not allowed?

A. Yes, sir, about in the center of the paved area, about the center of the platform, there were two lines across the pavement which was marked where parking was not permitted at that point.

Q. That was such as the stairway going up from this platform to the upper portion?

A. It went up the same continuous steps where right along that would lead up to the platform. There were two white lines that marked that off as a walk-way.

Q. Persons could go directly up without having to go around his automobile that was parked, from the pavement up to the wooden platform, then up several steps to the enclosed porch?

A. If you got out of your car you would have to walk back behind the row of cars and then

(Testimony of Herbert D. Windsor.)

across to get into that strip. There was no room to go in front of the cars because the car bumpers, the grill and bumper blocked that off.

Q. The automobiles were parked right——

A. (Interruptnig): Against the——

Q. Bulkhead?

A. Yes, the concrete forming a bumper for the cars, help to stop.

Q. Now, do you recall whether or not the place where your wife fell was at the portion of the platform that is marked off for entrance and exit into the paved area? [40]

A. Oh, no, it wasn't. It was down where we parked our car which was down toward the lower end away from the cafeteria. Cars were parked there, they were lined up for the cars, and that is where it was, right in the vicinity, where our car was parked. It was adjacent to our parked car.

Q. You are quite certain that your wife continued to walk right along until she arrived at the edge of the platform and then she fell; is that right?

A. Yes, sir.

Q. While walking forward? A. Yes, sir.

Q. You don't recall having her stopping there and turning about to speak to you?

A. No, she didn't do anything of that kind.

Mr. Deasy: I have no further questions.

The Court: I would like to ask the witness a question.

(Testimony of Herbert D. Windsor.)

Examination

By the Court:

Q. When you arrived there and drove your car up against the front bumper, against that cement bulkhead, the tires hit the concrete? A. Yes.

Q. And then, after you had done that—what kind of a car were you driving?

A. 1947 Nash.

Q. You were driving it? [41] A. Yes, sir.

Q. Where was your wife sitting?

A. On the side of me.

Q. And in the center a dog, I guess.

A. Yes.

Q. You got out of the car, at the time you parked the car was there a car on either side of you?

A. Fairly certain there was a car on the side where we got out.

Q. That would be on the left side of you?

A. I think we both got out on the right because we went toward the cafeteria.

Q. Then when you got out on the right, got out of that car, what did you do, step right up, you and your wife and boy, step right up onto this cement step and then from there on to the wooden platform and then go over to the stairs and go on to the porch and then go from the porch into the cafeteria?

A. That is the way we went, stepped right up on the platform from the car.

(Testimony of Herbert D. Windsor.)

Q. All three of you did that? A. Yes, sir.

The Court: That is all I want.

Q. (By Mr. Deasy): You were going back the same route in reverse when the accident happened?

A. We went right toward our car.

The Court: When did you arrive there at the park, about [42] an hour before you left?

The Witness: Arrive in Yosemite?

The Court: I mean, arrive at the lodge there.

Mr. Lillie: The place where you parked.

The Witness: Yes, as soon as we parked we went into the cafeteria.

The Court: What time of the evening was it?

The Witness: Oh, it must have been close to the time the cafeteria closed. It was getting around 7 o'clock, in the neighborhood of 7 o'clock because——

The Court: Was it light then?

The Witness: It was rather a twilight. It wasn't light enough to see distinctly, it was kind of——

The Court: It was the longest day of the year.

The Witness: In the canyon, the walls of the canyon—I know that we remarked how dark it got, got dark early there.

The Court: That is all.

Mr. Deasy: I have no further questions.

Mr. Lillie: You may step down.

Plaintiff rests, your Honor.

Mr. Deasy: At this time, your Honor, in behalf of the defendant, the United States Government, I move the Court for a judgment in favor of the

defendant upon the ground, first, that the complaint in the action does not state a cause of action against the defendant, the United States of America, under the provisions of the Federal Tort Claims Act in that it is alleged nowhere in the complaint that any employee of the United States was guilty of any act or omission, wrongful or negative, in the line of duty, or the scope of his employment. The complaint merely alleges that the defendant, referring to the defendant who is—which has been since dismissed from the case, and the defendant, the United States of America, that the defendants were careless and negligent in the following particulars: I am referring to paragraph 5 on page 3—

“In failing to maintain said platform, or sidewalk flooring in a safe condition. The partially decayed, jagged and worn condition of the said platform planks, above the aforementioned concrete step, rendered said means of egress and ingress to the said cafeteria, and other facilities operated by the defendants extremely hazardous and dangerous to the defendants customers, invitees and to the public;

“In failing to maintain adequate lighting for the safety of their customers, invitees and the public, at said time and place rendering said means of ingress and egress extremely dangerous and hazardous to defendant’s customers, invitees, and to the public using the same;

“(c) that defendants at said time and place carelessly and negligently failed to warn or advise their customers, invitees and the public, among whom was

plaintiff, Baeda [44] E. Windsor, of the existence of the unsafe conditions of the said edge of the platform flooring, although defendants knew, or should have known that the said plaintiff was unaware of the existence of same; that defendants at said time and place carelessly and negligently maintained the pavement immediately adjacent to said concrete step. The pavement was of uneven surface and of a different grade from the main pavement, rendering same extremely dangerous and hazardous to customers, invitees and to the public using the same."

Now, the Federal Tort Claims Act allows the suits against the United States in situations only where it is alleged and proven that some employee of the United States while acting in the line of duty, or the course and scope of his employment, was guilty of some negligence or wrongful act or omission. Now, there is a mere allegation here that the United States failed to give warning of the dangerous conditions existing on these premises. There is no allegation that any employee of the United States had knowledge of the existence of a dangerous condition.

Under those circumstances, there is a failure to allege the cause of action under the Federal Tort Claims Act.

Secondly, we move for a judgment in favor of the Government of the United States upon the ground that the evidence in the case fails to establish any act or omission on the part of [46] a Government agent, either in the line of duty or otherwise, so

far as that is concerned, which constitutes carelessness or negligence. There is no proof that the United States maintained or was under any duty of maintaining, repairing or operating the lodge premises upon which this accident occurred.

Now, I would like to invite the Court's attention to Plaintiff's Exhibit No. 1, this blueprint. On page 1 of the [46-A] said blueprint, the portion marked Section "CC" which is a profile of, or section of the platform and concrete step and the parking area, there appears a notation, there is a line drawn directly along the exterior surface of the concrete step, referring to this mark-up, Exhibit 11, this line, this surface here (indicating), the blueprint indicates the National Park Service maintains a portion of the premises from the exterior surface of this bottom step across the roadway and that the Yosemite Park and Curry Company maintains the property on this side, on the upper side, down to this surface. In other words, that the maintenance, as far as the United States is concerned, is confined at that point to the roadway, the parking area and the gutter abuts upon the concrete bulkhead and the concrete bulkhead, the wooden platform above it and the building abutting on the platform on the other side are maintained by the Yosemite Park and Curry Company under the terms of the lease, which is in evidence here as Plaintiff's Exhibit No. 8.

Now, with reference to the evidence before the Court, it appears that from the examination of the

photographs and the other documentary evidence introduced here, that in front of the building which was operated by Yosemite Park and Curry Company, or under lease or agreement with the Department of the Interior of the United States, there was a wooden platform extending the width of the building as the plaintiff Herbert Windsor estimated some 100 feet or less. That adjacent to this [45] wooden platform was a concrete bulkhead approximately $7\frac{1}{2}$ inches lower than the—that is, the top surface of the wooden platform immediately adjacent to this concrete bulkhead; that then there was a drop somewhat irregular running more or less 7 to 12—7 to $9\frac{1}{2}$ inches, I think it was, between the concrete bulkhead and the surface of the paved parking area. It is apparent from the evidence that the area in question was used for the parking of automobiles operated by persons having business within the lodge premises. As Mr. Windsor testified, there were portions of the platform and the area immediately adjacent to it marked off with white lines as no parking area, that these were opposite the stairs leading up from the wooden platform to the porch of the lodge and were obviously kept clear as a means of ingress and egress provided by the operators of the lodge premises for the entrance and exit of guests and other invitees into their premises.

It appears from the evidence that the plaintiffs, Herbert and Baeda Windsor, upon arrival parked their automobile in the parking area abutting it, the front wheels of the same against the concrete bulk-

head paralleling the wooden platform; that then they proceeded to take a short-cut to the porch by climbing up over the concrete bulkhead onto the wooden platform and then proceeding along the same to the steps leading to the porch; that they did not at that time avail themselves of the [47] means of ingress and egress provided by the operators of the premises; that upon completing their business in the lodge premises, they then proceeded to leave the same to return to their automobile, making use of the same short-cut to get back to the car, although as the testimony shows at that time it had become somewhat darker and the light was dim and the condition of the steps and the platform difficult to judge by reason of the lack of artificial lighting adequate to show the conditions at that place. But nevertheless they elected to proceed by the shortest route rather than take the route provided for them by the operators of the premises.

At no time while they were in the lodge premises were they there at the invitation of the United States. They were there upon business in the lodge as invitees of the Yosemite Park and Curry Company, the operators of the premises under this lease agreement from the United States.

That at no time did the United States undertake to operate the lodge premises to provide means of ingress or egress thereto or to undertake the upkeep of the platform abutting on the parking lot.

That the evidence shows that the concrete bulkhead and the platform were operated by the Yosemite Park and Curry Company under agreement

of the United States. There is nothing in the evidence, your Honor, to show that any employee of the United States had any duty to erect any hand rails, guards, lights or [48] other equipment upon the portion of the premises where this accident happened. The only conceivable basis that the plaintiffs could assert—upon which the plaintiffs could assert any cause of action against the United States would be upon the theory that the provision of a gutter next to the concrete bulkhead constituted an act of negligence.

Now, it should be, I think, remembered that this accident took place in a National Park, a mountain area provided by the people of the United States for recreation and for scenic purposes. Other park purposes is that it is in a mountainous country, that the Government has attempted, and the lease which is in evidence will show, that it is the policy of the Government to attempt to maintain as much of the natural scenery as possible, having in mind that some comforts should be provided for those who care to avail themselves of the park.

This is not a situation comparable to an accident of a similar nature occurring in a metropolitan center, in a city hotel or on a city street or sidewalk. When the public, including the plaintiffs in this case, visit a National Park, it is for the purpose of getting out into the country, into the wilds to some extent, so that they may enjoy the beauties of nature which is—it is the policy of the Government of the United States to make available to our

citizens; that when these plaintiffs, including Mrs. Windsor, visited the park they expected to visit a National Park. [49]

Mrs. Windsor testified that she had not been to Yosemite previously, but that she had visited other national parks, done a great deal of hiking and climbing and walking in the country. Therefore, it is not unreasonable that she should be expected to use care in her actions at this place where the accident happened; that she should not expect conditions to be comparable to city conditions, and that as a result she assumed a certain risk, conceding for sake of argument alone that a somewhat dangerous condition might have been existing. However, there is no evidence here to show that the government, that any employee of the government, had anything to do with the maintenance of these premises or that the act or omission on the part of any government employee had anything to do with the unfortunate injuries that the plaintiff sustained and the damages which they are after accrued to herself and to her husband.

Based upon these grounds, we move this Court a judgment in favor of the defendant, the United States, in this case.

The Court: Have you any evidence to offer yourself?

Mr. Deasy: If it should be necessary, I have one witness, Your Honor, yes.

The Court: I think I will deny your motion at

this time. You put your witness on. Is he available?

Mr. Deasy: Mr. McMullen.

J. I. McMULLEN

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you state your name to the court, please?

A. J. I. McMullen.

Direct Examination

By Mr. Deasy:

Q. What is your occupation, Mr. McMullen?

A. I am a lawyer.

Q. And where do you reside?

A. Here in San Francisco.

Q. Here in San Francisco. Are you practicing law at the present time?

A. Well, about two days a week. I am more or less retired.

Q. And in the summer of 1947 were you a visitor at Yosemite National Park? A. I was.

Q. Calling your attention specifically to June 21, 1947, did you have occasion on that day to be at Yosemite Park?

A. Yes, I was at the lodge that night at the time of the movie.

Q. And approximately what time of day was that?

A. Well, I had dinner there and my wife and my granddaughter and her other grandmother had gone to the movies. I never go to the movies and I sat out on the rail and smoked my pipe.

(Testimony of J. I. McMullen.)

Q. Where were the movies that evening?

A. There in the lodge building.

Q. On the ground floor? A. Only one floor.

Q. On the ground floor?

A. Only one floor. [51]

Q. They are on the——

A. (Interrupting): They are adjacent to the office. Also adjacent on one side to the cafeteria and on the other side to the office of the lodge.

The Court: The living room of the lodge?

The Witness: Yes, sir

Q. There is a porch with a railing at the exterior edge along the front of the lodge, is that right?

A. That is right.

Q. About how wide is that porch?

A. Well, it is about 10 or 12 feet wide. I would guess 12, I haven't seen it for two years, but I guess about 12 feet.

Q. In June of 1947 were there chairs or benches upon that porch?

A. Yes, but they were all in use, people waiting for the movies. That is why I sat on the rail.

Q. Sitting on the railing, sitting on the exterior edge of the porch? A. That's right.

Q. Was there at that time below the porch a wooden platform? A. There was, yes.

Q. That ran along the entire——

A. The entire length about 100 feet.

Q. How wide is that, Mr. McMullen?

A. I would say that was about 8 feet, possibly 9.

Q. Now, on the evening of June 21, 1947, did

(Testimony of J. I. McMullen.)

you observe anything unusual while you were sitting on this railing, on the porch?

A. Yes, I saw a lady fall off the porch.

Q. Will you tell us what, in more detail, just what you saw?

A. Well, about five minutes after eight I just lighted my pipe, I saw a lady and two gentlemen, the lady standing right at the edge of the platform, at a slight angle from the edge, with two gentlemen about 3 or 4 feet away from her talking with her and then just like that she went down, went off evidently, went over the edge.

Q. Was she walking at the time?

A. No, they were not, they walked up there and just stopped and she turned to say to the man she was with, not entirely turned, just slightly.

Q. And you saw her fall at that time?

A. Yes.

Q. Where did she fall?

A. She fell right off onto the ground.

Q. Down into the parking area?

A. Yes, between two cars.

Q. Did you ascertain who the lady was?

A. I didn't until the next day. I asked Mr. Sharp the next day if the lady was injured and he told me she had both legs broken. [52]

Q. Would you recognize her again if you saw her?

A. No. When the FBI called on me to question me they asked me if I could identify her. I told

(Testimony of J. I. McMullen.)

them I think I knew she was a lady around 40, I could say that much.

Q. You didn't get a good look at her face on account of the darkness, is that right?

A. It wasn't too dark. I didn't try to.

Q. Do you recall about what time sunset was that night?

A. Well, sunset was around close to 8 o'clock that night, but 3,000, 3,300 feet mountain right back of the lodge, and night comes rather early out there, but it wasn't—the street lights were just across the street, a big bonfire 100 feet across the street right in front of the lodge.

Q. Was the bonfire lighted, do you remember?

A. Oh, yes.

Q. Were the street lights on at that time?

A. Yes.

Q. The street lights across the street?

A. Right across, probably 75 feet from the platform.

Q. Now, there is a place marked off on this platform, is there not, with painted white lines for persons to cross from the——

A. Not on the platform, on the walk. There is a walk enters right in the center of the building with steps up to the platform, and then from the platform up to the porch, and the ground is marked off "No parking permitted", for people to enter [54] and exit.

Q. It was on this porch platform that this lady fell?

(Testimony of J. I. McMullen.)

A. Oh, no, she fell between—there was one car parked next to this walk that goes up to the porch, steps, regular steps, and then she fell between that car and one that was parked next to it.

Mr. Deasy: I have no further questions.

Cross-Examination

By Mr. Lillie:

Q. Mr. McMullen, there was no markings upon the platform at all? A. No.

Q. That indicated an entrance down on the paved——

A. It was down on the ground, the markings.

Q. And as a matter of fact the steps that you referred to up to the pavement where there were the two diagonal lines leading up to the entrance are similar all along the front of that platform, aren't they. A. No.

Q. There is a distinction?

A. There is a distinction between those steps and the bulkhead. The bulkhead was a rather high step.

Q. Can you tell me what the distinction is?

A. Well, they were regular steps, I imagine, with about a 7 inch tread, and the height of the bulkhead must have been much more than that. I would say it was probably 10 or 12 inches. [55]

Q. And you said there is a distinction between the steps where you walk up to the platform and the rest of the bulkhead?

A. Oh, yes, no question. I have been going up there for 47 years.

(Testimony of J. I. McMullen.)

Q. Just before the lady fell off the platform, did you see both the gentlemen with her or was one of them behind her and how far, if he was?

A. They were both behind her. When she came up I noticed them, when they first came up, and immediately after they came up she turned around to say something to these gentlemen.

Q. There was not one gentlemen alone?

A. No, there were two gentlemen. I don't know, I don't say who they were, I don't know who they were. I didn't know who she was either.

Q. Do you recall what kind of clothes she wore?

A. No.

Q. Recall how tall a woman she was?

A. No, I didn't pay any attention to it. I just saw her fall and as a matter of fact, just a couple of years before I broke my leg exactly the same way in my own house.

Q. Mr. McMullen, let me ask you one other question: do you know whether or not on these steps which are marked off for an entrance up to the platform, is there a gutter running in front of them?

A. A gutter? [56]

Q. That is, a depression?

A. Well, I think there is a slight depression, no gutter, probably a slight depression.

Q. In front of the steps leading up to where you made the entrance?

A. No, Well—yes, in front of the steps there is a——

(Testimony of J. I. McMullen.)

Q. It was dark enough at that time so you couldn't identify the person, could you?

A. If I had known him I could identify the person. I could see she was a lady around 40.

Q. You could see the outline in respect to her and the two gentlemen?

A. Oh, no, you could see them pretty good.

Q. Do you see them in the courtroom now?

A. I—I wouldn't identify them now, no, from seeing them then.

Mr. Lillie: That is all.

Redirect Examination

By Mr. Deasy:

Q. How far away were you from them from where you were sitting, would you say?

A. Oh, about 10 feet at the outside.

Mr. Deasy: No further questions.

Recross Examination

By Mr. Lillie:

Q. Mr. McMullen, was there a curio shop in the back of——

A. There is a curio shop there they use for the office, the [57] curio shop and then the post office.

Q. Where were you sitting in relation to either the curio shop or the post office?

A. I wouldn't say that I was sitting, leaning against the second post from the stairway from the center of the building stairway.

Q. From the center of the building stairway?

(Testimony of J. I. McMullen.)

A. Yes. I can tell you better from the drawings. It was about 10 feet from the stairway, I think. I don't know, I am just guessing the distance.

Q. I will show you Plaintiff's Exhibit 1, the first sheet, and let me show you, here, this figure which shows a gutter, a wooden platform, and the lodge porch, the cafeteria over here (indicating), the grill, the lobby, the curio shop and the post office—I will ask you approximately—I presume it was on this lodge porch railing along here?

A. Here, the front steps around there. Leaning against this post.

Q. Leaning against this post?

A. That is right, right here, just about here. (Indicating)

Q. Therefore right up here? (Indicating)

A. Right in, somewhere right in there. If this was drawn as it should be, it should be right here, yes.

Q. Do you recall how many cars were parked?

A. They were full of cars. [58]

Q. They were full.

A. Almost never got a place to park a car there. That was reserved for people that were going to register, but people going to register—we had to find some other place to park.

Mr. Lillie: Nothing further, Your Honor.

Mr. Deasy: That is all, Mr. McMullen.

The Government rests.

Mr. Lillie: I would like to call one witness in rebuttal.

HERBERT D. WINDSOR, JR.

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court, please?

A. Herbert D. Windsor, Jr.

Direct Examination

By Mr. Lillie:

Q. How old are you, Mr. Windsor?

A. Twenty-two.

Q. Your mother and father preceded you on the stand?

A. What?

Q. Your mother and father preceded you on the stand

A. Yes.

Q. And they are plaintiffs in this action?

A. Yes.

Q. You heard their testimony?

A. Yes.

Q. You understand the meaning of an oath?

A. Yes. [59]

Q. Do you recall the night of the accident in which your mother was injured and fell?

A. Yes.

Q. Now, will you tell me in what relation you, your mother and your father, as you observed, left the cafeteria on that night?

A. Well, my mother probably went out first. I don't remember that. I probably opened the door for her and she probably went out. I really don't remember that. I was in front of her down the steps. I went down the steps first.

Q. Which steps are you referring to?

(Testimony of Herbert D. Windsor, Jr.)

A. Well, the steps where she fell.

Q. You went down the steps first? A. Yes.

Q. How far away from her were you when she fell?

A. Oh, possibly 5 or 6 feet; maybe a lot more.

Q. Did you see her when she fell?

A. No, I heard her groan and I turned around. All I saw was a flash of it, but I couldn't really, I didn't really see her fall.

Q. At that time did you see——

A. Just a flash, and I turned around. She was lying face down on the ground.

Q. At that time did you see where your father was? A. Well, yes he was back behind.

Q. Behind what? [60]

A. Behind my mother, the other side of her.

Q. How far distant would you say?

A. Oh, 8 or 10 feet, probably.

Q. Did you hear any exclamation or your mother saying anything just prior to her falling?

A. No.

Q. And how far away from her were you at that time? A. 5 or 6 feet, probably.

Q. At any time did you hear her say anything to you or to your father in particular?

A. No, nothing whatsoever.

Q. You were no more than 5 or 6 feet ahead of her? A. That's right.

Mr. Lillie: That is all, your Honor.

Mr. Deasy: No questions.

Mr. Lillie: We rest, your Honor.

The Court: I don't need any argument about the facts. I need a memorandum from somebody about—from both sides, about these questions of law involved here. The responsibility of the United States Government—the government was apparently a lessor of this property extending to the outer boundary of that cement bulkhead.

Mr. Lillie: Yes, I am conversant with that fact.

The Court: Also the point that the Federal Tort Claims Act only covers claims of acts of some employee of the government [61] of the United States within the scope of its authority. Also the point that the lady was taking a short cut, not going where pedestrians should go. Also the point whether an employee of the United States had any duty to erect a handrail and building that bulkhead that way, or anything like that. Those legal matters I haven't had an opportunity to examine.

Mr. Lillie: Well, let me state——

The Court: I am not passing on them now, but suggesting there is where the doubts in my mind are created.

Mr. Lillie: I may be able to assist the Court in this respect, that I don't think there is any question as to lease. In reply to the Government, my position first of all is the lease was only offered to show the relationship of the parties as lessee and lessor. The Government owned the property. Secondly, that the management and control and upkeep of the

bulkhead and the step and the platform was devolved upon the——

The Court: Lessee.

Mr. Lillie: Lessee, and that the Government's duty under the lease was to care for the property and pavement from the edge of the cement block, which was the step at the bottom. In that respect, of course, it is going to be the plaintiff's contention in this brief is that you don't have to worry about the lease so far as the Court is concerned, and I think we can stipulate in that respect, can't we, counsel, that covered that porch? [62]

Mr. Deasy: Your pre-trial memorandum seemed to indicate that the lease puts upon the lessee the duty of maintaining the gutter. I didn't know——

Mr. Lillie: It puts upon the lessor the duty of maintaining the gutter. As a matter of fact, I think the specifications which were turned in indicates at one point where the Government has the duty of maintaining and where the lessee does.

But be that as it may, the plaintiff's contention will be this: that apparently on the theory where a person if they construct a buildnig or an article which would be in violation of a code, therefore, negligence per se, they can't avoid their liability on it by reason of a leasehold to someone else. If a third party becomes involved, primarily, at least, responsible for it and that was the basis of the introduction of the code.

The Court: Isn't there a general rule to the effect a building is leased entirely to the lessee, then

any injury occuring in that building, if the building is leased entirely to a lessee, that the lessee is liable for the negligent injury, not the lessor?

Mr. Lillie: Yes, that is right.

The Court: Because when they are at a place where they have common elevators, which is the obligation of the——

Mr. Lillie: Landlord.

The Court: ——landlord, then, of course, the landlord may be held under the proposition. [63]

Mr. Lillie: I think, what I am driving at is essentially this, Your Honor: I think that we will submit cases where a building is built in violation of the building code, and landlords subsequently rent it or lease it, the lessee assumes the obligation, where the courts hold the lessee is obligated for any neglect.

Mr. Deasy: I don't think that is the point here, Your Honor, for the reason: That there is no evidence the buildings here were constructed by the United States. As a matter of fact, they were not constructed by the United States, they were entirely constructed and being maintained ever since construction by the lessee. Because of the terms of the lease, that is the fact I am sure, Your Honor, it appears from the lease they have the right to build a building. The lease only provides for hotel accommodations and so forth, a very lengthy lease. I don't know if I can find it off-hand, but it is my understanding that the areas occupied by, and where there are concessions being run by the Yosemite

Park and Curry Company and leased as areas by the Company many years ago, and that the various hotel, camping and other facilities that are in existence there now, were erected by the lessee under this lease.

The Court: There is no evidence in this case; what is the fact on that? Can't you gentlemen stipulate? Is that what was done?

Mr. Lillie: I don't know, Your Honor, you have been saying—— [64]

The Court: The Government now says that the park company built the building.

Mr. Lillie: I presume that the Government did.

The Court: I assume that they did.

Mr. Lillie: I assume that they did, I have no knowledge, but I think we can get together.

The Court: If it was a lease of the land area.

Mr. Lillie: Yes.

The Court: That would be a different situation again.

Mr. Lillie: Yes, it would.

I want those facts before the Court if that was the fact but I don't think there is any question as to the maintenance of that gutter and that parkway in respect to the Government.

The Court: Trouble is, since this didn't occur in the gutter, it occurred because the woman fell down the steps.

Mr. Lillie: If that gutter had not been there, of course, it is the plaintiff's theory that the ankles wouldn't have been broken, if she had come down

on that ground, flat ground, where there was ground to support her heel, then there would have been no break. But it would be to my way of thinking nothing less than a trick to set a gutter right beside a step under those conditions. It is true that the act might have been started by the operation of that platform, of the defendant, the Yosemite Park Company. That has been dismissed, but it was concurred in by the Government in keeping that hazard there. [65]

The Court: According to Mrs. Windsor she broke one leg when she fell on the cement platform and then broke the other one—I understood her to say she felt that leg crack when she first went down on the cement platform, and felt the other crack when she fell in the gutter.

Mr. Lillie: If that is what the Court's understanding is, I would like to have the reporter read that portion and to see if it is different, because I would like to make a motion to reopen, because it is my understanding from what the plaintiff has told me that her first injury arose at the time her foot hit this asphalt ridge off the cement step on the ground in each instance. If the Court would like to, I can ask——

The Court: Put her on again.

Mr. Lillie: Mrs Wnidsor, will you step up here again?

The Court: Describe it all, Mrs. Windsor.

MRS. WINDSOR

Recalled:

By Mr. Lillie:

Q. What actually happened?

A. I came down—let's see——

Q. That is the wooden platform, this is the cement step, and this is—— (indicating)

A. This was where I was thrown off balance (indicating). Then I went down with my right foot on here, came down and hit my left foot here. This is where the left foot broke. I came down on the same kind of spot with my right foot and that is when it broke. I am quite sure I said that. [66]

Mr. Lillie: As she explained it, she was on the ball of her foot and her heel went back——

The Court: My notes aren't clear on that.

Mr. Lillie: I am glad that came up so we can clarify that. Any special time that Your Honor would like to give us?

The Court: Don't make these briefs too long. I understand what the facts are. How long do you want? Can you get your briefs in within ten days?

Mr. Lillie: Yes.

The Court: All right, the Government can have ten and you can have five for rebuttal.

The Clerk: This matter will appear on the calendar. It won't be necessary to appear again.

The Court: We will stand adjourned then, until 10 o'clock tomorrow morning. [67]

CERTIFICATE OF REPORTER

We, Official Reporters and Official Reporters pro tem, Certify that the foregoing transcript of 67 pages is a true and correct transcript of the matter therein contained as reported by us and thereafter reduced to typewriting, to the best of our ability.

/s/ KENNETH S. SAGAR.

/s/ RUSSELL D. NORTON.

[Endorsed]: No. 12468. United States Court of Appeals for the Ninth Circuit. Herbert Windsor and Baeda E. Windsor, husband and wife, Appellants, vs. United States of America, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 16, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 12468

United States
Court of Appeals
for the Ninth Circuit.

HERBERT WINDSOR and BAEDA E. WIND-
SOR, husband and wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division

FILED

APR - 5 1950

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for
the Northern District of California, Southern
Division

No. 28017-H

HERBERT WINDSOR, BAEDA E. WINDSOR,
Husband and Wife,

Plaintiffs,

vs.

YOSEMITE PARK & CURRY CO., a California
Corporation, UNITED STATES OF AMER-
ICA,

Defendants.

COMPLAINT FOR DAMAGES
FOR NEGLIGENCE

I.

Plaintiffs complain and allege, that the ground upon which jurisdiction of the court depends is that the United States of America is a party defendant herein. That plaintiffs are citizens of the State of California, and reside in the County of Los Angeles, State of California. That during all times herein mentioned, the defendant, Yosemite Park and Curry Co. was, and still is a corporation duly organized and existing under and by virtue of the laws of the State of California with its principal place of business in the City and County of San Francisco, State of California.

II.

That the matter in controversy herein exclusive of costs exceeds the sum of \$3,000.00.

III.

That the defendants at all times herein mentioned operated, controlled, managed and maintained camps catering to the public in the Yosemite National Park, which is situated in the State of California. That said Park is under the jurisdiction and control of the defendant United States of America. That among said camps is the camp referred to and known as the Lodge. That at said Lodge camp, defendants operate, manage, control and maintain buildings containing a cafeteria, gift shop, and other business, and also paved parking areas and sidewalks for the benefit of their customers, invitees, and the public generally. That said Lodge cafeteria opens on to a porch, which in turn opens on to a wooden platform, or sidewalk, constructed of boards. That directly across from said platform, or sidewalk from the entrance to the porch, there is single concrete step for public use to descend to a paved parking area for automobiles. That the level of said concrete step was not midway between the elevation of the said platform, and the grade of the said parking area. That at the bottom of, and immediately next to, and running along the face of said concrete step was a gutter, or depression in the said pavement which was approximately

three to four inches across and one to two inches in depth.

IV.

That at approximately 8 p.m. of the 21st day of June, 1947, plaintiff Baeda E. Windsor, after dining at the said Lodge cafeteria, was proceeding at all times in a careful and lawful manner to plaintiffs' automobile parked in the said parking area, and in such manner crossed the said porch, and the said platform, and to the edge thereof. That the said edge was in a dangerous and defective condition, in that the ends of the boards were worn and partially decayed, and were in a jagged condition. That no guard rails of any kind were installed by said concrete step. That no direct lighting was provided at said concrete step and the surrounding area. That because of the darkness of the night, and inadequate lighting, the aforesaid condition of the said edge was not apparent to said plaintiff. That no signs warning the public of the dangerous condition of said platform edge, and pavement depression were posted. That solely through the carelessness and negligence of the defendants as hereinafter set forth, the foot of plaintiff Baeda E. Windsor, slipped into a jagged, or uneven place in the edge of said platform causing said plaintiff to lose her balance, and step down the said concrete step, and into the depression in the pavement, in such manner as to cause her to fall violently to the pavement, and that as a direct and proximate result

thereof she sustained severe injuries, the same being hereinafter more specifically set forth.

V.

That the defendants were then and there careless and negligent in the following particulars, to-wit:

(a) In failing to maintain said platform, or sidewalk flooring in a safe condition. The partially decayed, jagged and worn condition of the said platform planks above the aforementioned concrete step, rendered said means of egress and ingress to the said cafeteria, and other facilities operated by the defendants extremely hazardous and dangerous to defendants' customers, invitees and to the public;

(b) In failing to maintain adequate lighting for the safety of their customers, invitees and the public, at said time and place rendering said means of ingress and egress extremely dangerous and hazardous to defendants' customers, invitees and to the public using the same;

(c) That defendants at said time and place carelessly and negligently failed to warn, or advise their customers, invitees and the public, among whom was plaintiff, Baeda E. Windsor, of the existence of the unsafe conditions of the said edge of the platform flooring, although defendants knew, or should have known that the said plaintiff was unaware of the existence of same;

(d) That defendants as said time and place carelessly and negligently maintained the pavement immediately adjacent to said concrete step. That

said pavement was of uneven surface, and of a different grade from the main pavement, rendering same extremely dangerous and hazardous to customers, invitees and to the public using the same; that defendants knew, or should have known that plaintiff Baeda E. Windsor, was unaware of the existence of said condition of the said pavement.

VI.

As a direct and proximate result of defendants' negligence, carelessness and unlawful conduct, as aforesaid, and by reason of plaintiff's fall so negligently caused by defendants, plaintiff, Baeda E. Windsor, was hurt and injured in her health, strength and activity, sustaining severe shock, fractures of the fibula in each leg, and injuries to the muscles, ligaments and tendons in both legs, all of which said injuries have caused and continue to cause said plaintiff great physical pain and suffering, all to her damage in the sum of \$10,000.00.

For a Further and Second Cause of Action, Plaintiffs Allege:

I.

Reallege and incorporate paragraphs I to V, inclusive, of the first cause of action, as though set forth herein in full.

II.

That by reason of said injuries plaintiff, Baeda E. Windsor, was compelled to and did remain in

the hospital for a period of 3 days, so as to enable said injuries to be properly treated, plaintiffs incurring hospital bills therefor in the sum of \$39.50, which sum is the usual, reasonable and customary charge therefor; that plaintiffs were compelled to and did employ the services of physicians to treat said injuries, incurring thereby an indebtedness in the sum of \$86.00, which sum is and was the reasonable value of said services; That plaintiffs were compelled to and did obtain X-rays, drugs and medical supplies in the sum of \$78.00, which is and was the *reasonable thereof*; that plaintiffs were compelled to and did employ the services of a nurse, and others to assist the said Baeda E. Windsor, in the treatment of said injuries, and in waiting upon her, incurring an indebtedness therefor in the sum of \$260.00, aggregating in all the sum of \$463.50, which sum was and is the reasonable value of the aforementioned services and materials.

Wherefore, plaintiffs pray for judgment against the defendants, and each of them for the sum of \$10,000.00, on the first cause of action; and for the sum of \$463.50 on the second cause of action; for costs of suit, and for such other and further relief as to the Court may seem proper.

/s/ PERRY P. YOHE,

Attorney for Plaintiffs.

State of California,
County of Los Angeles—ss.

Baeda E. Windsor, being by me first duly sworn, deposes and says: That she is plaintiff in the fore-

going and above entitled action; that she has read the foregoing complaint, and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ BAEDA E. WINDSOR.

Subscribed and Sworn to before me this 2nd day of Apr., 1948.

[Seal] /s/ MAUDE O. WERNHOFF,
Notary Public in and for said
County and State.

[Endorsed]: Filed April 16, 1948.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT YOSEMITE
PARK & CURRY CO. TO COMPLAINT

Defendant Yosemite Park & Curry Co., for its answer to the complaint in the above entitled action, admits, denies and alleges as follows:

As to First Alleged Cause of Action

I.

This defendant admits each and every allegation contained in paragraphs I, II and III of the first alleged cause of action of said complaint.

II.

This defendant denies each and every allegation

contained in paragraph IV of the first alleged cause of action of said complaint, except that this defendant admits that no guard rails were installed by said concrete step and that no signs were posted, and in this connection this defendant alleges that no dangerous condition existed and that no signs were needed.

III.

This defendant denies each and every allegation contained in paragraphs V and VI of the first alleged cause of action of said complaint; and, in this connection, this defendant denies that plaintiff Baeda E. Windsor has been injured or damaged in any manner or amount whatsoever by reason of any carelessness, or negligence, or act, or omission of this defendant, or of any servant, agent, or employee of this defendant.

IV.

As and for a Further and Separate Defense, this defendant alleges that plaintiffs, and each of them, were careless and negligent in and about the matters alleged in said complaint, and that said carelessness and negligence on said plaintiffs' own part proximately contributed to the happening of the accident and to the injuries, loss and damage complained of, if any there were.

As to Second Alleged Cause of Action

I.

For its answer to paragraph I of the second alleged cause of action of said complaint, this de-

defendant hereby repeats and makes a part hereof all of its foregoing admissions, denials, allegations and separate defense contained in its answer to the first alleged cause of action of said complaint.

II.

This defendant is without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph II of the second alleged cause of action of said complaint, and placing its denial thereof upon that ground, this defendant denies each and every allegation contained in said paragraph II.

Wherefore, this defendant prays that plaintiffs, or either of them, take nothing herein, and that this defendant have judgment for its costs of suit herein incurred.

DANA, BLEDSOE & SMITH,
Attorneys for Defendant,
Yosemite Park & Curry Co.

State of California,
City and County of San Francisco—ss.

Leighton M. Bledsoe, being first duly sworn, deposes and says:

That he is a member of the law firm of Dana, Bledsoe & Smith, which law firm has its offices at 440 Montgomery Street, San Francisco, California; that said Dana, Bledsoe & Smith are the attorneys for the defendant Yosemite Park & Curry Co., in

the above entitled action; that the officers of said defendant are absent from said City and County of San Francisco, where affiant has his and said law firm have their offices, and for that reason affiant makes this verification for and on behalf of defendant; that affiant has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to such matters which are therein stated on his information or belief; and as to such matters he believes the same to be true.

/s/ LEIGHTON M. BLEDSOE.

Subscribed and sworn to before me this 8th day of June, 1948.

[Seal] /s/ HAZEL E. THOMPSON,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed June 17, 1948.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now Defendant United States of America, and answering plaintiffs' complaint on file herein denies and alleges as follows:

I.

Answering the first count or cause of action of said complaint, said defendant denies and alleges as follows:

1. Denies each and all the allegations of paragraphs III, IV, V and VI of said first count or cause of action, except that defendant admits that Yosemite National Park is under the jurisdiction and control of the defendant.

2. Denies that plaintiffs, or either of them, have been damaged in the sum of \$10,000.00, or any part thereof, or in any sum or amount, or at all.

II.

Answering the second count or cause of action of said complaint, said answering defendant denies and alleges as follows:

1. Answering the allegations of paragraphs I to V, inclusive, of the first cause of action incorporated by reference in paragraph I of said second count or cause of action, said answering defendant here refers to and incorporates herein as though fully set forth its answers to said paragraphs as set forth in its answer to said first count or cause of action herein.

2. Said defendant has no information sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph II of said second count or cause of action, and therefore in placing its denial upon that ground denies each and all of said allegations.

3. Denies that plaintiffs, or either of them, have been damaged in the sum of \$463.50, or any part thereof, or in any sum or amount, or at all.

III.

Further answering said complaint and each of the two counts or causes of action thereof, and as a separate defense thereto, said answering defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by an unavoidable accident.

IV.

Further answering said complaint and each of the two separate counts or causes of action thereof, and as a separate defense thereto, said answering defendant alleges that the conditions complained of in said complaint were open and obvious conditions and were known to the plaintiff Baeda E. Windsor herein, and that said plaintiff at the time referred to in said complaint assumed the risk of injury from said conditions.

V.

Further answering said complaint and each of the two separate counts or causes of action thereof, and as a separate defense thereto, said answering defendant alleges that the accident and injuries and damages complained of, if any, were due to and caused by plaintiff Baeda E. Windsor's own negligence proximately contributing thereto; and allege that at the time and place referred to in said complaint said plaintiff Baeda E. Windsor failed to use ordinary

care and caution to protect herself from injury, failed to use her eyes and other faculties, and carelessly and negligently stood, walked and conducted herself upon the occasion referred to in said complaint, thereby proximately contributing to the cause of the accident and injuries and damages complained of, if any there were.

VI.

Further answering said complaint and each of the two separate counts or causes of action thereof, and as a separate defense thereto, said answering defendant alleges: That at the time referred to in said complaint the premises upon which the accident referred to in the complaint is alleged to have occurred were not in the custody or control of said defendant, nor were said premises at that time maintained by said defendant, but that said premises were at all times referred to in said complaint under the custody and control of and were maintained by Yosemite Park and Curry Company, a corporation, under and by virtue of the terms of a certain agreement entered into between the defendant United States of America and the said Yosemite Park and Curry Company, dated October 1, 1932, under and by virtue of the terms of which agreement the said premises were controlled, operated and maintained by said Yosemite Park and Curry Company.

Wherefore, said defendant prays that plaintiffs take nothing by their complaint herein, and that

said defendant may be hence dismissed with its costs.

FRANK J. HENNESSY,
By /s/ DANIEL C. DEASY,
United States Attorney,
/s/ DANIEL C. DEASY,
Assistant U. S. Attorney,
Attorneys for Defendant,
United States of
America.

[Endorsed]: Filed January 14, 1949.

[Title of District Court and Cause.]

JUDGMENT OF DISMISSAL

The motion of defendant Yosemite Park & Curry Co. to dismiss the above action as to it for lack of jurisdiction having come on regularly to be heard on the 12th day of July, 1949, before the Honorable Herbert W. Erskine, Judge of the United States District Court for the Northern District of California, Southern Division, and the same having been duly presented by Morton B. Jackson of the firm of Dana, Bledsoe & Smith, attorneys for said defendant, and the plaintiffs appearing by Messrs. Harry P. Yohe and Cameron Lillie, their attorneys, and defendant United States appearing by Daniel Deasy, Assistant U. S. Attorney, and the same having been fully argued and heard and good cause appearing therefor,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the above entitled action be and the same is hereby dismissed as to said defendant Yosemite Park & Curry Co. for lack of jurisdiction.

Dated:

/s/ HERBERT W. ERSKINE,
Judge of the United States
District Court.

[Endorsed]: Filed July 18, 1949.

In the United States District Court for the Northern District of California, Southern Division

No. 28017-H-E

HERBERT WINDSOR, BAEDA E. WINDSOR,
Husband and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above-entitled action coming on regularly for trial on July 12, 1949, before the Court sitting without a jury, Perry P. Yohe, Esquire, appearing as attorney for the plaintiffs, and Frank J. Hennessy, through Rudolph J. Scholz, appearing as attorney for the defendant United States of America, the Court having heard the testimony, examined

the proofs, and the cause having been submitted upon briefs, and the Court being fully advised in the premises and having made its Findings of Fact and Conclusions of Law;

Now, Therefore, by reason of the law and the Findings aforesaid, It Is Hereby Ordered, Adjudged and Decreed:

I.

That judgment is hereby granted in favor of the defendant United States of America and against the plaintiffs Herbert Windsor and Baeda E. Windsor;

II.

That defendant United States of America is entitled to recover its costs against the said plaintiffs in the sum of \$.

Dated: October 31st, 1949.

/s/ HERBERT W. ERSKINE,
U. S. District Judge.

Entered in Civil Docket Nov. 1st, 1949.

[Endorsed]: Filed Oct. 28, 1949.

In the United States District Court for the Northern District of California, Southern Division.

No. 28017-H-E

HERBERT WINDSOR, BAEDA E. WINDSOR,
husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action coming on regularly for trial on July 12, 1949, before the Court sitting without a jury, Perry P. Yohe, Esquire, appearing as attorney for the plaintiffs and Frank J. Hennessy, through Rudolph J. Scholz, appearing as attorney for the defendant United States of America, the Court having heard the testimony, examined the proofs, and the cause having been submitted upon briefs, and the Court being fully advised in the premises, now makes its Findings of Fact as follows:

Findings of Fact

I.

That all the allegations of the complaint contained in paragraphs I and II and that the Yosemite National Park was under the jurisdiction

and control of the United States of America, are true;

II.

That all the allegations of paragraphs III and IV are not true in so far as they refer to the United States of America;

III.

That all the allegations of paragraphs V and VI, so far as they refer to the United States of America, are not true;

IV.

That any injuries or damages which the plaintiffs suffered were not the liability or responsibility of the United States of America; that there is no evidence of any negligent or wilful act or omission on the part of any employee of the United States while acting within the scope of his office or employment, or otherwise;

V.

That plaintiff Baeda E. Windsor was herself negligent and her own negligence proximately contributed to the accident, injuries and damages complained of;

VI.

That the defendant United States of America was not negligent.

Conclusion of Law

The Court concludes that the plaintiffs are not entitled to judgment against the defendant United

States of America and that the defendant United States of America is entitled to judgment against plaintiffs for its costs in the sum of \$.

Let judgment be entered accordingly.

/s/ HERBERT W. ERSKINE,
United States District Judge.

Dated: San Francisco, California, October 31st,
1949.

[Endorsed]: Filed Oct. 28, 1949.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 28017 H

HERBERT WINDSOR, BAEDA E. WINDSOR,
husband and wife,

Plaintiffs,

vs.

YOSEMITE PARK & CURRY CO., a California
Corporation, UNITED STATES OF AMERICA,

Defendants,

NOTICE OF APPEAL

To the Defendant, United States of America and
Its Attorney Frank J. Hennessy, Esq.,

Notice is hereby given that Herbert Windsor,
and Baeda E. Windsor, husband and wife, plain-

tiffs in the above entitled action, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 1st day of November, 1949, in favor of defendant United States of America, and against plaintiffs above named and from the whole of such judgment.

Dated: December 22, 1949.

/s/ PERRY P. YOHE,

Attorney for Appellants.

[Endorsed]: Filed Dec. 23, 1949.

[Title of District Court and Cause.]

DESIGNATION OF PAPERS AND RECORDS
ON APPEAL

To the Defendant, United States of America and
Its Attorney Frank J. Hennessy, Esq.

You and Each Of You, will please take notice that the Plaintiffs on their Appeal from the Judgment entered in the above entitled Cause, designates the following papers, records, and exhibits, to wit:

The Judgment Roll:

1. The Complaint and the Answers thereto, Motions, Orders of the Court, all Notices duly filed, and Judgment after Trial.

2. All Exhibits admitted in evidence, and specifically the following:

(a) Defendants Exhibit 1, being a drawing of the locus in quo.

(b) Plaintiff's Exhibit 3, being a reconstructed cross-section of the platform, concrete step and Parking Area level, with the depression indicated in the said paved Parking Area.

(c) Plaintiff's Exhibit 8, being a Lease of the premises wherein the Government of the United States is Lessor, and Yosemite Park & Curry Co., is Lessee.

(d) Plaintiff's Exhibits 9 and 10, being two letters Exhibit 9, referred to as the Ross-Loos Letter, Exhibit 10, referred to as the Avery Stern Letter.

(e) Plaintiff's Exhibit 12, being a Building Code issued by the United States Department of the Interior, National Park Service.

(f) All other Exhibits properly admitted in evidence.

3. The Notice of Appeal, and the Designation of Papers and Records.

4. The Reporter's Transcript of the Trial Proceedings.

Dated: December 28, 1949.

/s/ PERRY P. YOHE,

Attorney for Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 28, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents and accompanying exhibits, listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the Record on Appeal herein as designated by the Appellant, to wit:

Complaint for Damages for Negligence.

Answer of Defendant Yosemite Park & Curry Co. to Complaint.

Answer to Complaint.

Judgment of Dismissal.

Judgment.

Findings of Fact and Conclusions of Law.

Notice of Appeal.

Designation of Papers and Records on Appeal.

Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15.

In Witness Whereof, I have hereunto set my

hand and affixed the seal of said District Court this 31st day of January, A.D. 1950.

C. W. CALBREATH,

Clerk,

[Seal] By /s/ M. E. VAN BUREN,

Deputy Clerk.

[Endorsed]: No. 12468. United States Court of Appeals for the Ninth Circuit. Herbert Windsor and Baeda E. Windsor, husband and wife, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 31, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12468

HERBERT WINDSOR, BAEDA E. WINDSOR,
Husband and Wife,
Plaintiffs and Appellants,

vs.

YOSEMITE PARK & CURRY CO., a California
Corporation,
Defendant,

UNITED STATES OF AMERICA,
Defendant and Appellee.

CONCISE STATEMENT OF POINTS ON
APPEAL AND DESIGNATION OF REC-
ORD

Plaintiffs-appellants make the following state-
ment of points upon which they intend to reply:

That the trial court erred in each of the follow-
ing respects:

1. In finding and holding that the Defendant,
United States of America, as a Lessor, owed no
duty to the Plaintiff, Baeda E. Windsor, and there-
fore in the event of negligence would not be liable
for damages.

2. In finding and holding that the Defendant,
United States of America, had no control over the
condition of the platform, the concrete step, or the

surface of the parking lot, and was therefore free from any negligent act or omission.

3. In finding and holding that the Defendant, United States of America, was not negligent.

4. In finding and holding that the Plaintiff, Baeda E. Windsor was negligent and that her negligence was the proximate cause of her injuries.

5. In refusing to find that the defendant, United States of America, as a Lessor and Landlord, was negligent.

6. In refusing to find that the Defendant, United States of America, had exclusive control over the construction, maintenance, and repair of the parking area for motor vehicles.

7. In refusing to find that the Defendant, United States of America, in constructing and otherwise maintaining the drain in the surface of the parking area was negligence per se.

The entire record as certified to you must be printed in its entirety as the above points upon which the Plaintiffs intend to rely on appeal, are framed by the pleadings, proceedings and judgment in that record.

Dated: February —, 1950.

/s/ PERRY P. YOHE,

Attorney for Plaintiffs and
Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed Feb. 11, 1950.

No. 12468

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERBERT WINDSOR and BAEDA E. WINDSOR, husband and wife,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

OPENING BRIEF FOR APPELLANTS.

FILED

MAY 11 1930

PAUL P. O'BRIEN,

PERRY P. YOHE,

11579 Hamlin Street, North Hollywood, California,

Attorney for Appellants.

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No. 12468
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

HERBERT WINDSOR and BAEDA E. WINDSOR, husband and
wife,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

OPENING BRIEF FOR APPELLANTS.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Northern District of California in favor of the defendant in an action against the United States of America under the Tort Claims Act. Jurisdiction was conferred on the lower court under Title 28 U. S. Code, Sections 931 *et seq.* (now 28 U. S. C. 1346(b), 1402(b), 2402, and 2671-2680). Jurisdiction of this court is conferred by Title 28, U. S. Code, Section 1291 (formerly 28 U. S. C. 225). The tort for which the complaint was filed occurred in Yosemite National Park. All of Yosemite National Park is included within the Northern District of California by Title 28, U. S. Code, Section 84(a)(1). The venue of a Tort Claims Act suit is in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred. (See 28 U. S. C. 931(a)—now 28 U. S. C. 1402(b).)

Statement of the Case.

The appellants Herbert Windsor and Baeda E. Windsor filed their complaint in the United States District Court for the Northern District of California, on April 16, 1948 for a tort committed June 21, 1947, naming the United States of America and Yosemite Park & Curry Co., a California corporation, as defendants and praying for damages of \$10,000.00 on the first cause of action and \$463.50 on the second cause of action. [R. 2.]

The defendant, Yosemite Park & Curry Company filed its answer on June 17, 1948. [R. 8.] The defendant United States of America filed its answer on January 14, 1949. [R. 11.] When the case came on for trial on July 12, 1949, a motion to dismiss on behalf of the defendant Yosemite Park & Curry Company was granted [R. 27], and Judgment of Dismissal for lack of jurisdiction, as to said defendant, was filed on July 18, 1949. [R. 16.]

The case proceeded to trial as to the defendant, United States of America; was completed on July 12, 1949, and submitted on briefs. [R. 27 to 91, incl.] On October 31, 1949, the District Judge signed Findings of Fact and Conclusions of Law [R. 18 to 20, incl.], and Judgment in favor of the defendant United States of America and against the plaintiffs. [R. 16-17.] This judgment was entered in the Civil Docket by the clerk on November 1, 1949. [R. 17.] Notice of Appeal was filed on December 23, 1949. [R. 20-21.]

Questions Involved.

The questions involved in this appeal are, the failure of the court to find that the defendant, through its employees and agents, was negligent and, that such negli-

gence was the proximate cause of the plaintiffs' injuries. Also, the court erred in finding that the plaintiffs were contributorily negligent thus proximately contributing to the injuries.

Specification of Errors. [R. 25-26.]

1. In finding and holding that the defendant, United States of America, as a Lessor, owed no duty to the plaintiff, Baeda E. Windsor, and therefore, in the event of negligence, would not be liable for damages.

2. In finding and holding that the defendant, United States of America, had no control over the condition of the platform, the concrete step, or the surface of the parking lot, and was therefore free from any negligent act or omission.

3. In finding and holding that the defendant, United States of America, was not negligent.

4. In finding and holding that the plaintiff, Baeda E. Windsor, was negligent and that her negligence was the proximate cause of her injuries.

5. In refusing to find that the defendant, United States of America, as a lessor and landlord, was negligent.

6. In refusing to find that the defendant, United States of America, had exclusive control over the construction, maintenance, and repair of the parking area for motor vehicles.

7. In refusing to find that the defendant, United States of America, in constructing and otherwise maintaining the drain in the surface of the parking area, was negligent *per se*.

ARGUMENT.

POINT I.

Specification of Errors Nos. 1 and 5, Will Be First Discussed, but There Is No Clear Line Between the Argument Under Point I and Point II, the Latter Designated to Cover Specification of Errors Nos. 2 and 3.

The defendant, United States of America is the sole and exclusive owner of Yosemite National Park. *Collins et al. v. Yosemite Park & Curry Company*, 304 U. S. 518.

At the entrance to the Park an admittance fee is paid.

The said defendant as such owner, decided in the interest of efficient profitable management, and to facilitate good service to the general public, that it would grant the right to another by lease, to operate the hotels, pavilions, novelty shops, grocery stores, meat markets, garages, service stations, etc.—in the same manner as the owner of a large amusement park grants ground concessions within his amusement park. [R. 29.] Exhibit Number 8, is the lease made by the defendant, United States of America, through the Executive Authority, Department of the Interior, with its lessee Yosemite Park & Curry Company.

Plaintiffs entered the Park June 21, 1947. [R. 33.]

As stated by the Court of Appeals for the Ninth Circuit in the case of *King v. Yancey*, 147 F. 2d 379, and quoting from the case of *Smith v. Pickwick Stages System*, 113 Cal. App. 118:

“ . . . plaintiff was there as one of three classes of persons: a Trespasser, Licensee, or an Invitee.”

As the plaintiffs were within Yosemite National Park at the instance of both the lessor and the lessee, they were invitees. It was therefore incumbent upon the defendant to exercise ordinary care toward the plaintiffs in the care of the premises under their control. The term ordinary care is a relative term, and the standard by which it is to be measured varies with the circumstances attending each particular case. As stated by the court in *Burns v. Dunham*, 148 Cal. 208:

“When any degree of care is required in the performance of an act, what constitutes the exercise of that particular degree, always has relation to the nature of the act itself.” (See also 19 Cal. Jur. 581.)

What were the surrounding circumstances that would have bearing upon the standard of care?

“A. Well, sunset was around close to 8 o'clock that night, but 3,000, 3,300 feet mountain right back of the lodge, and night comes rather early out there, but it wasn't—the street lights were just across the street, a big bonfire 100 feet across the street right in front of the lodge.

Q. Was the bonfire lighted, do you remember?

A. Oh, yes.

Q. Were the street lights on at that time? A. Yes.

Q. The street lights across the street. A. Right across, probably 75 feet from the platform.” [R. 79; see also R. 56, bottom of page.]

The defendant permitted its lessee to operate an eating house on the valley floor at a depth of more than a half a mile permitting their lessee to serve meals in the evening. The patrons were provided with a place to park their motor vehicles and a certain avenue or avenues of entrance were provided from the said parking area, to the eating house operated by defendant's lessee. [R. 34, 35 and 68.]

From the surface of the parking area to the elevation even with the threshold of the eating house, a patron, arriving by motor vehicle, must negotiate (1) from the surface of the parking area to the top of a certain bulkhead, curb, or concrete step; (2) from the top of the concrete step to the top of a platform, and (3) from the top of the platform to the level of the porch. This would be the cross sections laid out on Plaintiff's Exhibit 1. [R. 28.]

The dimensional elevations of these levels are not uniform, varying an inch or so at different points, but from one level to the other, the evidence leaves no uncertainty.

"A. Yes, the dimensions were the dimension lines from the top of the concrete up to the top of the platform, and it varies from 7 inches to 8 inches on that distance, and then if you want to drop down from the concrete, from the concrete down to the pavement, down to the bottom of the gutter, there is a dimension line there, an arrow pointing to it which varies from $7\frac{1}{2}$ inches to 12 inches. From the concrete, top of the block, to the bottom of the gutter, and then at the bottom, the depth of the gutter varies from one inch to two inches, width from 6 to 10 inches."

The witness is here testifying from the drawings furnished by the defendant United States, and admitted into evidence as Plaintiff's Exhibit 1. [R. 51-52.]

To determine the standard of care one must first ask, under the circumstances, what would the ordinary prudent person do, and then measure the conduct of the plaintiffs with that behavior.

The plaintiffs parked their car at right angles to the bulkhead or step, in the same manner that a person parks a car on the street. The fact is, defendant's witness, J. I. McMullen, has called the specific area a street. [R. 79.] In getting out of their motor vehicle, not meeting any bar or barrier in the shape of a railing, not being advised of any specified route by sign or notice and facing a curb of 10 inches, what would the ordinary prudent person do?

“When through a long period of years a particular mode of conduct has been followed as the proper and reasonable mode of a prudent man to follow under particular circumstances, one cannot be charged with negligence in following that mode of conduct alone.”

Denman v. City of Pasadena, 101 Cal. App. 769.

Under the acknowledged existing physical facts and attendant circumstances of parking their automobile, what course of conduct would be expected from an ordinary prudent person traversing the distance to the door of the cafeteria? The trial court was exercised about this phase of the plaintiff's conduct.

“By the Court: Then when you got out on the right, got out of that car, what did you do, step

right up, you and your wife, and boy, step right up onto this cement step and then from there onto the wooden platform and then go over to the stairs and go on to the porch and then go from the porch into the Cafeteria? A. That is the way we went, stepped right up on the platform from the car.

Q. All three of you did that? A. Yes, sir.

The Court: That is all I want.

Q. (By Mr. Deasy): You were going back the same route in reverse when the accident happened?

A. We went right toward our car." [R. 67.]

Thus the plaintiffs entered Yosemite Park. They stopped their car in front of the Lodge Cafeteria, got out of their car, stepped right up on the concrete curb step or bulkhead, mounted the platform at the point where their car was parked, crossed the platform, ascended some steps from the platform to the porch, entered the Lodge Cafeteria, had their dinner, and followed the same line of travel back to their motor vehicle.

The duty owed:

"It is the duty of a property owner to provide safe means of entrance and exit both for the tenants and the latters' invitees. (*Gerard v. Wilson Holding Company*, 79 Cal. App. 2d 553.)

POINT II.

As Remarkd Above, This Is a Continuation of Point I and Embraces Nos. 2 and 3 in the Specification of Errors.

“One who leases part of the premises, retaining control of other portions, such as common walks or passages, which the tenant is entitled to use, is subject to liability to persons lawfully on the land, with the consent of the tenant, for damages caused by a dangerous condition existing on the part under owner’s control, if by reasonable care he could have discovered the condition and made it safe. (Several cases cited.) Accordingly, invitees of the tenant are regarded as being invitees of the owner while on passageways which invitees of the tenant have a right to use and which are under the owner’s control.”

Johnston v. De La Guerra Properties, Inc., 28 Cal. 2d 394 (see also Restatement of Torts, Chap. 13, Sec. 359).

“When a landlord retains or has control of a portion of the leased premises, the responsibility rests upon him to see that no injury results to those having rights there because of the way in which that portion is occupied or used.” (15 Cal. Jur. 741. Cases thereunder.)

The plaintiffs have attempted to show that the defendant United States of America, as a lessor, owed a duty to the plaintiffs to use care by reason of their relationship. Then by reason of the surrounding circumstances, the plaintiffs have attempted to establish the nature and extent of the duty so owed. The plaintiffs will now attempt to show how that breach of duty caused the injuries from which the plaintiffs seek damages.

The plaintiff, Baeda E. Windsor, at about the hour of 8 P. M. crossed the threshold of the door of the cafeteria out onto the porch. Now there is no testimony as to which set of stairs were used by the said plaintiff in descending from the porch to the level of the platform. It will be noted on the drawing that there are three sets of steps, one in the middle and one on each side thereof. These may be noted upon the drawings—Exhibit 1.

Her path of travel, after descending the steps from the porch was to cross the platform to her motor vehicle. The angle she crossed the platform would depend upon the exact position of her car and the specific set of steps she descended from the porch. Both of these facts are unknown. The witnesses have testified that there were no markings on the platform. [R. 79-80.] There is testimony that there was no railing upon the platform [R. 34], nothing to indicate any defined line of travel and each motor vehicle was in the same relationship as all others that were parked in front of the platform.

The evidence indicates that her son preceded her in crossing the platform, and that her husband was behind her. The testimony concerning her approach to the edge of the platform and the movement of her feet is quite clear. [R. 34-36; 91.]

She was thrown off balance by something at the edge of the platform, and she quickly stepped down to the concrete step with her right foot, and then with her left foot to the paved parking area. These two steps lowered her body about 17 inches. This is not the testimony of a falling person. It is the testimony of an alert individual who had responded to an incipient loss of balance only.

There had been constructed in the surface of the paved parking area, directly adjacent to, and parallel with the face of the concrete step, a drain or gutter, indicated upon the exhibits and testified to from the drawings as being 1 to 2 inches deep and 6 to 10 inches wide. [R. 51.]

The plaintiff testified that she extended her left foot to regain her balance and the heel of her said left foot came to rest at the bottom of the gutter and the ball of her foot on the ridge. [R. 36-37.] This uneven loading on the bones in the ankle joint caused a fracture and simultaneously generated a reflex and she brought the right foot down to still regain her balance. This foot landed, as would be expected, in the same place as the other, to-wit, with the heel in the gutter and the ball of the foot on the ridge. This identical unequal loading on the bones of the ankle, caused identical injuries to the fibula in both extremities. [Exhibits 9 and 10; R. 29-30.] It is significant to point out that the plaintiff has never complained of any other injuries except these fractured bones. No bruises or contusions, sprains or trauma. Dr. Sturm makes no mention of anything more than "oblique fractures of the lower end of each fibula." Does this not support the testimony of the plaintiff and refute the testimony that she fell. [R. 78.] The testimony of Herbert D. Windsor was ". . . I saw her put the other foot down and slump to the pavement." [R. 57.]

Digressing for the moment, there is the question as to the legal aspects of the fact that the plaintiff lost her balance upon the property leased to the tenant and broke

her ankles on the property owned by the landlord. Upon this question of proximate cause Professor Beale writes in 33 Harv. Law Review 663:

“4. If the defendant has created a passive force, condition, situation or risk, which foreseeably increases the chances of harm through an active force not created by the defendant, then proximate cause exists.”

Restatement of Torts, Secs. 431 and 439.

“The actors negligent conduct is a legal cause of harm to another if—

(a) His conduct is a substantial factor in bringing about the harm.

“If the effects of the actor’s negligent conduct actively and continuously operate to bring about harm to another the fact that the active and substantially simultaneous operation of the effects of a third person, innocent, tortious or criminal act, is also a substantial factor in bringing about the harm, does not protect the actor from liability.”

California cases in point:

Keiper v. Pacific Gas & Elec., 36 Cal. App. 362;

Crabbe v. Rhodes, 101 Cal. App. 503.

Plaintiffs contend that the lessee’s negligence consisted in the “chewed up” condition of the edge of the platform. [R. 46.]

Plaintiffs further contend that the lessor’s negligence consisted in the presence of a drain or gutter in the surface of the paved parking area, adjacent to a place where people step down from a higher elevation. [R. 51-52.]

POINT III.

The Next Assignment of Errors Is Nos. 6 and 7 in the Specification of Errors. This Involves the Principles and Rules in the Law of Master and Servant and the Doctrine of *Respondeat Superior*, as It Is Applied to the Tort Claims Act. (U. S. C. Title 28, Sections 1346 and 2674.)

“Under Federal Tort Claims Act, whether employee of the Federal Government was acting in line of duty at time of accident so as to render the government liable for his negligence, must be determined by doctrine of *respondeat superior* in like manner as it would be determined in case of a private person under that doctrine.”

Hubach v. United States, 174 F. 2d 7.

This is a waiver of sovereign immunity and postulates the question of interpretation. The recent case of *United States v. Aetna Cas. & S. Co.*, advance opinions of Law Ed., Vol. 94, p. 151, decided by the Supreme Court declares, in headnote 8:

“The doctrine that statutes waiving sovereign immunity must be strictly construed is not applicable to the Federal Tort Claims Act.”

Who were the servants of the defendant United States of America, acting within the scope of their authority, were negligent, and by that negligence caused the injuries for which the plaintiffs press their suit for damages?

Exhibit 12 is a building code that was secured from the Department of the Interior, and counsel for the de-

fendant, United States of America, stipulated that Mr. Cecil J. Doty, regional architect would testify as to the existence of this code. [R. 30-31.] Here then is evidence of the existence of qualified engineers, employees of the defendant acting within the scope of their authority, in a division of the Executive branch of the United States of America, owners and operators of Yosemite Park. In connection with this building code, and its relation to the immediate question, the court is respectfully requested to read Article XII of the lease and thereafter to read the following section of the building code, namely—3302, 3305, 3306, and 3307, all sections in chapter 33 thereof.

Apparently the drain, cast in the concrete pavement, was adjacent to the step and one might expect a patron to step over it. The constructors may not have anticipated the plaintiff's manner of injury; but it is urged that by the exercise of ordinary care, the agents and servants of the defendant, United States of America, should have foreseen that it was dangerous.

“If the negligent act or omission is one which a person ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, he is liable for any injury proximately resulting therefrom, although he might not have foreseen the particular injury which did happen.”

Lim Ben v. Pacific Gas & Electric, 101 Cal. App. 174;

Bowley v. Margrum & Otter, 3 Cal. App. 232.

In California, *Clowdis v. Fresno Flume and Irrigation Co.*, 118 Cal. 315 is a leading case in the law of Master and Servant.

“Where a duty is owed to the public, a servant to whom its performance is intrusted represents the master, however subordinate or menial his task may be, and within the scope of his employment to perform such duty, his Knowledge is the Master’s Knowledge, and his acts the master’s acts, and the injury as to the master’s responsibility is the same as if he had personally entered upon the performance of the duty, under the same circumstances, and with the same knowledge possessed by his servant; nor can a failure to perform such duty, or its improper performance, be excused by showing that its execution was intrusted to a servant even of approved carefulness, knowledge, or skill; but it must be further shown that the servant, in the particular matter, exercised the full degree of care, and showed the requisite amount of skill.”

POINT IV.

The Final Assignment of Error Is No. 4 in the Specification of Errors.

Was the plaintiff, Baeda E. Windsor, negligent, and did her negligence contribute to her injuries?

There was considerable testimony about certain markings and their influence upon the conduct of an ordinary person. Now there were no markings on the porch, on the platform or on the concrete step. [R. 65, 79-80.] From the testimony it appears that there were two white lines on the paved parking area that crossed the street. [R. 65.] This would be a cross-walk for pedestrians. Was it negligence on the part of the plaintiffs, after parking their car at the lower end away from the cafeteria [R. 66], because the parking stalls directly adjacent to the concrete step were “. . . full of cars” [R. 83.], was it negligent conduct to step right up on the “sidewalk” at that point? Was it incumbent upon the plaintiffs to have noted that cross-walk as they drove over it, and then, when they got out of their car, to have passed along the rear of the parked automobiles so that they might use a few feet of the cross-walk? If the servants of the defendant desired this mode of travel, why did they not have a barrier by a railing instead of constructing it the way they did? The means of approach at any point along the concrete step were the same, and as stated above, much like a person parking against the curb on a street.

The trial court declared that no argument was needed upon the facts but stated—“Also the point that the lady was taking a short cut, not going where pedestrians should go.” [R. 86.] It is earnestly urged that the course of conduct of the plaintiffs does not show that the lady took

a short cut, and that her course of travel, as she came out of the cafeteria, was where pedestrians should not go. Assuming for the moment that, after eating, plaintiffs had gone to the Curio Store before going to their automobile. Upon leaving the Curio Store they might have descended the steps at the far end of the porch, away from the cafeteria. Under this assumption what course of conduct, or line of travel, would have been expected of the ordinary person?

Well settled principles of law place upon a person the responsibility of recognizing danger and a dangerous condition. The plaintiffs knew it was dark, and as the place was full of cars, shadows may have added to the patent peril of the surroundings; but it is contended that the conduct of the plaintiff was that of the ordinary person under the circumstances.

The plaintiff's testimony of caution, corroborated by the testimony of her husband, and supported by the nature and manner of her injuries, is in sharp contrast to the testimony of Mr. J. I. McMullen, the Government's only witness.

"A. Yes, I saw a lady fall off the porch." [R. 78.]

"A. She fell right off onto the ground." [R. 78.]

It is the position of the plaintiffs that (1) a dangerous condition was created by the defendant's servants, acting within the scope of their authority, or (2) that the dangerous condition, under the circumstances, ought to have been anticipated, and (3) that the plaintiff Baeda Windsor did exercise due caution and circumspection commensurate with the existing danger,—same consisting of the absence of proper lighting and handrails. She can only be charged

with negligent conduct, if her conduct, at the time of injury, was not that of the ordinary person under the circumstances.

“The defendants in this action have set up in their answer the plea of contributory negligence. You are instructed that such plea is an affirmative defense, and the burden of proof rests on the defendants to establish it, if any. You are not to assume the existence of contributory negligence in the absence of evidence merely from its being pleaded by the defendant, and contributory negligence, if any, must proximately cause injury before it can bar a right to recovery.”

In *Breaks v. Anderson*, 95 A. C. A. 802, this instruction was held to be a correct statement of the law. Further on, in the same case:

“A party has succeeded in carrying his or her burden of proof on an issue of fact, if the evidence favoring his or her side of the question is more convincing than that tending to support the contrary side.”

Conclusion.

The plaintiffs submit that the findings of fact of the court below are incorrect and that the conclusions drawn therefrom are not in accordance with law.

In the *Collins v. Yosemite Park & Curry Company* case, it is established that the United States of America are the proprietors of Yosemite National Park.

The lease discloses a profitable relationship of landlord and tenant by virtue of a *quasi-monopoly*.

There was a building code set up by an agency of the Executive Department of the United States Government, clothing skilled employees, with authority to construct,

alter, and otherwise maintain and administer the premises within the Park.

Under the Tort Claims Act, the said proprietor (and as lessor and lessee), shall be considered . . . "in like manner as it would be determined in case of a private person under that doctrine." (*Respondeat superior.*)

Hubach v. United States, supra.

The plaintiff, Baeda E. Windsor, as an invitee, was injured by reason of a dangerous condition, either purposely created, but in any event permitted to exist, by the defendant, United States of America.

Accordingly it is submitted that the judgment in favor of the defendants should be reversed, and judgment in favor of the plaintiffs should be ordered.

Respectfully submitted,

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Attorney for Appellants.

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No. 12,465

IN THE
United States Court of Appeals
For the Ninth Circuit

HERBERT WINDSOR, BAEDA E. WINDSOR
(husband and wife),

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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**United States Court of Appeals
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HERBERT WINDSOR, BAEDA E. WINDSOR
(husband and wife),

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

THE FACTS.

The evidence before the Court establishes the following facts:*

1. Many years prior to the happening of the accident which is the basis of plaintiffs' complaint, the United States entered into an agreement with Yosemite Park & Curry Company whereby the United States leased certain portions of the Yosemite Park to said Company for the establishment and operation by

*R.T. denotes Reporter's Transcript. First figure is the page number and second figure the line number.

said Company of hotel and camping facilities. (Exhibit 8—"Lease").

2. At the time of the accident mentioned in the complaint, as shown by the blue print drawings (Exhibit No. 1), the Yosemite Park & Curry Company was maintaining the Lodge, including the wooden platform in front thereof, and the concrete step or bulkhead below said platform and adjacent to the paved automobile parking area. The United States was maintaining the paved parking area up to a line coincidental with the exterior perpendicular face of said concrete bulkhead.

3. Said platform and concrete bulkhead extended the entire length of the Lodge building. Above said platform (reached by three steps) was a porch enclosed by a wooden railing.

4. On the date of the accident the appellants arrived at Yosemite Park and left their automobile parked against the platform. They stepped up onto the bulkhead near their car, then to the wooden platform; proceeding along the platform they mounted the steps to the porch and entered the cafeteria, where they dined.

5. Upon leaving the cafeteria in the Lodge building at approximately 8:00 P.M. on the longest day of the year (R.T. 68), the appellant Baeda Windsor proceeded down the steps from the porch and diagonally across the wooden platform in the direction of the spot where the family automobile was parked.

6. According to her testimony, as she reached the edge of the platform, something made her lose her balance. She stated that in an effort to regain her balance she stepped onto the concrete bulkhead and thence down to the pavement. Her foot struck the pavement partly in and partly out of a shallow depression extending along the bulkhead adjacent to the perpendicular exterior face thereof. She felt something "crack" in her foot and immediately stepped down with the other foot, with the result that it was similarly injured. (R.T. 34-13). She did not know what caused her to fall (R.T. 46-22). They were retracing their steps when the accident happened. (R.T. 67-23).

7. At the time of the accident, the porch and platform were dimly lighted, although across the parking area—some fifty feet away—there were lights on standards and a large bonfire was burning. (R.T. 79-15).

8. According to an impartial witness, Joseph I. McMullen, the accident happened in a different fashion. He testified that Mrs. Windsor was standing near the edge of the platform speaking to two gentlemen and then stepped over the edge and fell to the ground. (R.T. 78-5).

9. On the date of the accident there were white lines painted on the pavement of the parking area immediately opposite the stairs leading from the platform to the porch. In entering the Lodge the appellants did not ascend the bulkhead and platform at this point, nor did the accident occur there.

ARGUMENT.

- (1) UNDER THE FEDERAL TORT CLAIMS ACT THE UNITED STATES HAS WAIVED A PORTION OF ITS SOVEREIGN IMMUNITY TO SUIT.

But the United States does not consent to be sued in all situations where, if a private person, it would be liable in tort. The act specifically narrows the field to cases in which liability arises under the doctrine of "*respondeat superior*". The act states that the government may be sued upon claims in tort arising

" * * * on account of damage to or loss of property or on account of personal injury or death *caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment*".
(Emphasis added).

See

Hubsch v. U. S., 174 Fed. (2d) 7;

Rutherford v. U. S., 73 F. Supp. 867 (affirmed in 168 F. (2d) 70);

Fries v. U. S., 170 F. (2d) 176 (certiorari denied, 226 U.S. 954).

This liability is further limited by the exclusions enumerated in the act, including the following:

“(a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.”

There is no evidence before the Court to indicate that the maintenance of the depression or gutter referred to in the evidence was other than a discretionary function of the Department of the Interior or National Park Service. Therefore the maintenance or failure to maintain said gutter or depression in the pavement comes within the aforementioned exclusion of the Act.

See

Denny v. U. S., 171 F. (2d) 365 (as to discretionary matters).

There is no evidence of any negligent or wrongful act or omission on the part of any employee of the United States *while acting within the scope of his office or employment*, or otherwise.

(2) The proximate cause of the accident was either the appellant's own carelessness in stepping over the edge of the platform, or it was a condition of premises not within the control of the United States. Conceding for the sake of argument, that plaintiff's version of the accident is correct, she was caused to fall by reason of the rough condition of the edge of a platform exclusively under the control of, and maintained by the Yosemite Park & Curry Company. If there was any negligence causing appellant's injury, it was the negligence of the Yosemite Park & Curry Company.

Whatever the condition of the roadway or gutter below the bulkhead, it was not the proximate cause of appellant's injury. She fell because of a roughness in

the platform. Whatever caused her to fall was the proximate cause of any injury she received.

(3) The condition complained of by appellants was an open and obvious condition, and one which was known to them, or should have been known, had appellant Baeda Windsor used ordinary care and caution on the occasion of the accident.

(4) The accident which occurred to appellant, Baeda Windsor, was not such as could be foreseen or expected by a person of ordinary intelligence.

(5) It should be noted that a marked means of ingress and egress was provided for patrons of the Lodge, and that the appellants elected not to use it but instead to climb onto the platform at another point—a place set aside for automobile parking. Similarly, at the moment of the accident, the appellant, Baeda Windsor, was in the act of taking a short cut, having chosen an unsafe way, when a safe way was provided for her. In doing so, she assumed any attendant risk of injury.

PLAINTIFFS' BRIEF.

We cannot agree with appellants' interpretation of the facts, or with their statements regarding the applicable law.

As to point I of appellants' brief, the entire testimony is, of course, not included in appellants' brief. Taking the entire testimony, at its best for appellants, it is merely a conflict in testimony and, as this Court

has decided, where evidence, even though conflicting, supports the findings and judgment of the trial Court, the Appellate Court will not order a reversal. It also appears that the Appellate tribunal must take that view of the evidence most favorable to the appellee.

Bellon v. Silver Gate Theatres, Inc., 4 Cal. (2d)

1;

Cleo Syrup Co. v. Coca-Cola Co., 139 Fed. (2d)

416.

The appellants were there not "at the instance of both the lessor and lessee" but voluntarily. The Government did not invite them to use the premises leased to and by the Yosemite Park & Curry Co., to-wit, the Lodge.

As to points II and III:

(a) Whether the Government had control of the Lodge Cafeteria would be reflected by the lease and it shows control and complete maintenance of the structure was the duty of the lessee. As lessor, the United States is not liable to appellants.

(b) It is likewise, if anything, a conflict in evidence.

(c) Appellants insist that the accident happened upon a "stairway" and argue that the Building Code sections read in evidence, having been violated by the Yosemite Park & Curry Company in not providing equal risers, nor providing handrails, etc., the United States is somehow guilty of negligence.

It is obvious from the evidence before the Court that the accident did not happen upon a "stairway".

No ordinary interpretation of that term could make it applicable to the structure involved here. The evidence discloses that the wooden platform below the railed porch of the building was in the nature of a sidewalk, raised above the level of the roadway, as is common in areas where there is a winter snowfall. Adjacent to and lower than this platform was a concrete bulkhead running the length of the area designed for the parking of automobiles. The mere coincidence of a pavement, bulkhead and platform adjacent to and parallel with one another does not constitute them a "stairway". The fact that above the platform, *and separated therefrom by a railing*, there was a porch with three flights of steps leading down to the platform, argues against the structure complained of being a "stairway". The Building Code requirements for stairways have therefore no application to the platform and bulkhead.

(d) Appellants cite certain cases in support of general principles of law with relation to negligence. These authorities, however, have no application to the facts in the instant case.

There was only one proximate cause of the injury to appellant, Baeda Windsor. There is no evidence that any employee of the United States did anything or omitted to do anything, as a result of which she fell.

The most the United States can be accused of under the evidence is the maintenance of a shallow gutter into which the plaintiff was caused to fall by reason of the negligence of a third party. To assert that such

action constituted negligence is on a par with asserting that a property owner would be negligent for maintaining a concrete sidewalk in front of his house if a passing pedestrian tripped up another, who thus suffered a fractured skull which he would not have suffered if the sidewalk had been earth instead of concrete.

The existence of the shallow gutter at the place where plaintiff fell is a mere "condition". It was in no way connected with her fall. Whether said "condition" was the result of negligence is wholly immaterial unless it was a proximate cause of the accident.

As to point IV:

In view of the testimony, among other things, that the appellant, Baeda Windsor, was standing at the edge of the platform with two gentlemen about three or four feet from her who were talking to her, and she suddenly fell while standing still (R.T. 78), there is, in our opinion, sufficient evidence to justify a finding of contributory negligence.

CONCLUSION.

In order to determine the issue of liability in this case, it is necessary to determine:

(1) Has the Court jurisdiction to make any finding?

(2) What was the proximate cause of the injury?

(3) Was it caused by an employee of the defendant acting within the scope of his employment?

(4) Was there contributory negligence?

We submit that it is not necessary for the Court to inquire into whether or not the maintenance of the gutter complained of in this case constituted negligence unless the Court first finds that the plaintiff was injured by reason of the act or omission of some employee of the appellee *acting within the scope of his employment*.

The evidence shows that appellant, Baeda Windsor, was caused to fall by either her own carelessness or by reason of some condition of the wooden platform or sidewalk, which was *exclusively maintained by the Yosemite Park & Curry Company*. Since the maintenance of the platform or sidewalk was the duty of that Company exclusively, it is impossible to reach the conclusion that any act or omission in such maintenance could have been the act or omission of an employee of the United States *acting within the scope of his employment*. There is no evidence that any employee of the United States undertook to, or did maintain or do any act in connection with the platform. Even if such was the case, it is obvious that such act was not within the scope of his employment, since the United States had no duty in connection with the maintenance of the platform.

The evidence shows that the accident was caused *solely* by some condition of the platform or by appel-

lant's own carelessness in stepping off the platform, and the trial Court found that it was due to her own carelessness.

Appellants argue that Baeda Windsor would not have received the precise injury she did receive if the gutter had not been there. This may or may not be true, but that does not make the presence of the gutter the proximate cause of the injury.

We submit that in any event the presence of a shallow depression or gutter at the place complained of does not suggest or establish any negligence. It is necessary to consider all the circumstances, including the fact that the condition complained of existed not in any urban or rural community but in a recreation area, a National Park set aside for the maintenance of its natural beauties for the benefit of the public. An ordinary person of average intelligence does not expect roads, paths, or other accommodations there to be developed to the degree to which he is accustomed in more artificial communities.

Dated, San Francisco, California,
June 16, 1950.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

RUDOLPH J. SCHOLZ,
Assistant United States Attorney,
Attorneys for Appellee.

No. 12468

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HERBERT WINDSOR and BAEDA E. WINDSOR, husband and
wife,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

APPELLANTS' REPLY BRIEF.

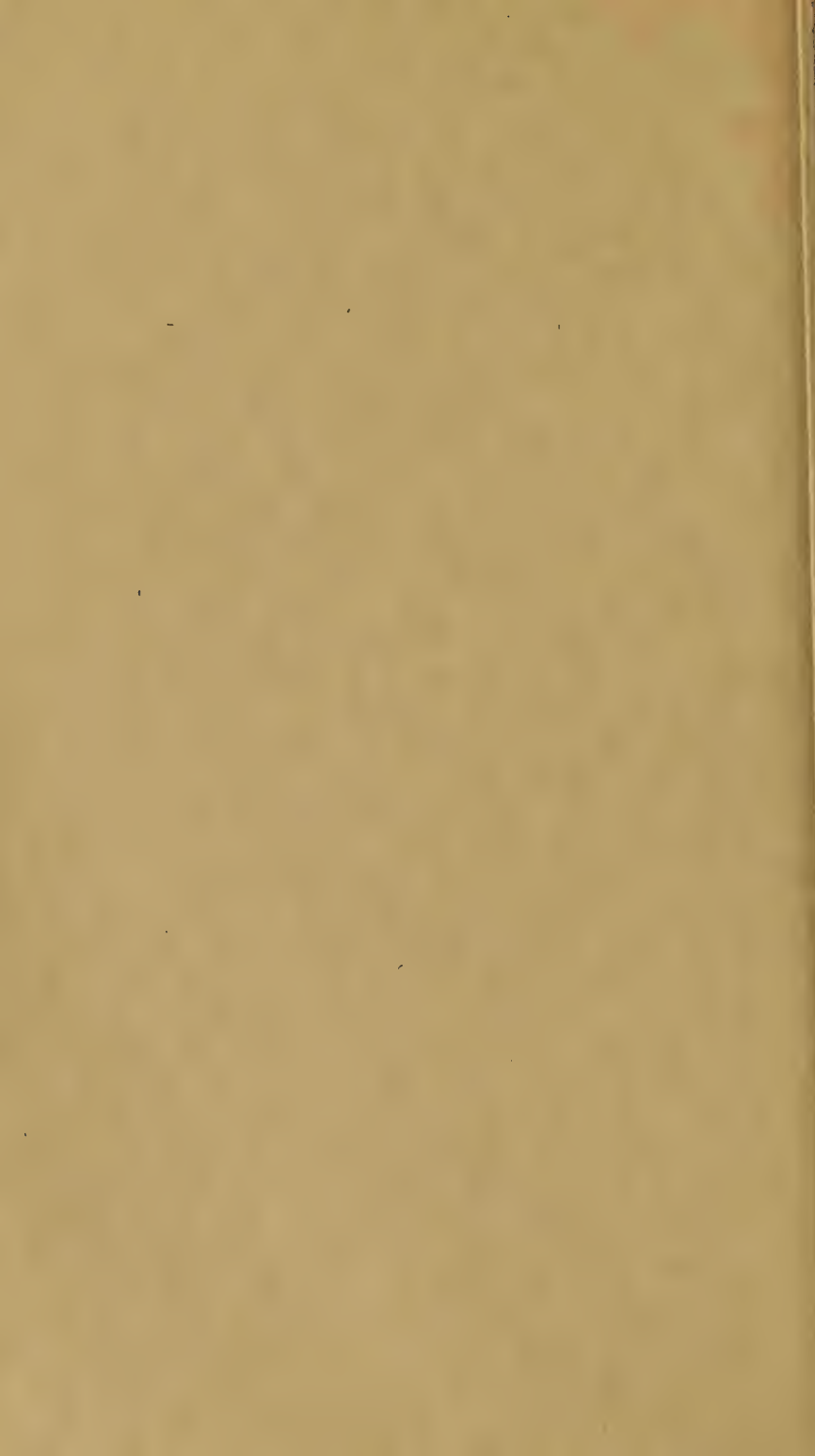
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No. 12468

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UNITED STATES OF AMERICA,

Defendant-Appellee.

APPELLANTS' REPLY BRIEF.

The Brief of Appellee is divided into four parts, namely—(1) The Facts; (2) Argument; (3) Plaintiffs' Brief, and (4) Conclusion. This reply will examine the subject matter of each in the same order.

The Facts.

1. (The Lease.)

The defendant, United States, as the owner and landed proprietor of Yosemite National Park, empowered a private corporation under a lease to operate the facilities in the said Park at a profit.

Cerri, et al. v. United States, 80 Fed. Supp. 831.

“[5] Under the Tort Claims Act permitting recovery where United States if a ‘private person’ would be liable . . . determines relationship of

government to third parties, and gives consent to be treated by injured party as if it were a private individual amenable to court action without claim of immunity in all those cases not exempted by the Act, where negligence of agents, servants or employees has caused injury to a third party.” (Italics ours.)

Article XII of the lease:

“It is further understood and agreed that the exercise of the privileges conferred by this contract shall be subject to the laws of Congress governing the park and the rules and regulations promulgated thereunder, *whether now in force or hereafter created or provided;*”. (Italics ours.)

Article XIV of the lease:

“(b) In connection with said hotel and camping business and related facilities and conveniences, the company shall be entitled to occupy . . . all . . . located in said area . . . *and shall maintain and repair same* . . .” (Italics ours.)

Under (c) of the same article all such expenditures may be audited as business expenses or capital assets upon which profits are based.

Article VI of the lease:

“(j) That before the Secretary shall be bound by this agreement the company shall furnish a joint and several bond . . . necessary for the full protection of the Government, conditioned for the *faithful performance of this agreement* in all its particulars by the company.” (Italics ours.)

Does the Appellee infer by the opening words of “Many years ago . . .” that the Tort Claims Act is not within the four corners of the lease? It is true that the said article declares, “Laws of Congress *governing the park* . . .”, but the invitee has always had the right to file his case before the court of claims. The Tort Claims Act is the enlargement of the rights of a citizen being the abrogation of the “Kingly prerogative” of immunity and the installation of a more just and modern institution in its place. Upon the enactment of the Tort Claims Act, this procedural reform became a part of the laws governing the park, and the decision in the above case determined the relationship of the Government to the plaintiffs by reason of the principle enunciated clearly by the court in *McStay v. Citizens Bank*, 5 Cal. App. 2d 595.

“The invitation to use the premises of another is inferred when there is a common interest, or mutual advantage.

A license is inferred when the object is the mere pleasure or benefit of the person using them.”

Therefore as there was a common interest, and a mutual advantage to the Lessor, to the Lessee and to the plaintiffs, the status of the plaintiffs is that of an invitee.

The plaintiffs give approval to the appellee’s outline of the facts set forth in the first three pages of its brief with the following exceptions:

Appellee misquotes the testimony relating to the distance from the street light to the platform. (Subdivision 7, p. 3.) The testimony [R. 79] set the distance at 75 feet—not 50 feet.

There seems to be indecision on the part of Appellee as to the manner in which plaintiff Baeda Windsor descended from the platform to the paved parking area at which time she fractured the ends of the fibula of both ankles. In subdivision 8, page 3, Appellee declares that she *"stepped over the edge and fell to the ground."* In subdivision (2) of "Argument," page 5, Appellee has the plaintiff again *stepping over the edge of the platform.* Appellant acknowledges that she did intentionally step down to the concrete step and then down to the paved parking area. She had placed first the left foot and then the right at the lowest level at a place where she had a right to expect that the tread was suitable and safe. She was not injured on the step; but this is not the testimony of defendant's witness, Joseph I. McMullen. Appellee has quoted the true testimony of its said witness on page 9 of its brief, to-wit: ". . . *she suddenly fell while standing still . . .*", and reading the record, this is the only conclusion warranted by the testimony of the said witness. [R. 78.] Appellee seems to recognize that Baeda Windsor did not "tumble" down on the platform or the step, because there are undeniable facts that make any such conclusion untenable.

Do the facts indicate an unexpected fall or is there indication that Baeda Windsor was alert? A physician in a hospital maintained in the park by the defendants made no mention of any injuries other than the fractured ends of the fibula, and the said physician [R. 58-59], an agent of the defendants, remarked, ". . . never had two broken ankles . . . come in singles just like that, from ski jumpers . . ."

Argument.

This part of Appellee's brief seeks to establish that the construction of the gutter in front of the step was a "discretionary function" within the provisions of Title 28, Section 2680 of the Tort Claims Act. That to intentionally create a dangerous condition can be a "discretionary function."

Appellee cites the case of *Denny v. United States*, 171 F. 2d 365. The facts of this case are these:

Title 10, U. S. C. A., Sec. 96 provides:

"The medical officers of the Army, 'whenever practicable,' shall attend the families of Army personnel free of charge, . . ." and Army regulation No. 40-505 is the same end.

"[1-3] . . . It becomes manifest that the phrase '*whenever practicable*' . . . stamps the obligation . . . as discretionary in character." (Italics ours.)

What person or agency has the obligation and the authority to supervise construction in Yosemite Park? What person or agency may declare that the lessee, in permitting the edge of the platform to become "chewed up" [R. 46] thereby violated the provisions of the lease? What person or agency thus permitted a trap to be set for the plaintiff, Baeda E. Windsor? And may this person or agency, regardless of the duty that is conferred upon them, set up that these duties are "discretionary functions."

Title 16, U. S. C. A.:

"Section 1. There is created in the Department of the Interior a service to be called The National Park Service . . . The Service . . . shall promote

and regulate the use of the Federal areas known as National Parks”

(Under historical note at the end of the said section it will be noted that this service took over the office of National Parks, Buildings and Reservations March 2, 1934, a year before the lease herein was executed.)

The regional architect of the National Park Service, Mr. Cecil J. Doty, is at 180 Montgomery Street, San Francisco. [R. 30-31.] Under the aforesaid Article XII of the lease, the Building Code was a “regulation” duly promulgated.

Lem v. United States, 89 Fed. Supp. 915.

Dorothy Lem sued the United States of America under the Federal Tort Claims Act for personal injuries sustained as the result of stepping into a hole abutting the edge of a concrete gutter separating a sidewalk from a grass park strip in an area under the control of the *National Park Service*.

Findings of Fact by the Court (Lem Case.)

1. Plaintiff attended a concert at the Watergate open air auditorium given by a National orchestra. (It is presumed that it was a free attraction.)

2. At 10:30 P.M. plaintiff departed on foot and while walking—stepped off the sidewalk into the grassy park strip in order to go around some people.

5. In returning to the sidewalk—she stepped in a hole. The hole was about 6 to 12 inches wide and 12 to 18 inches deep, *and was not man-made*.

6. The sidewalk was 20 feet 6 inches wide and in good condition where plaintiff fell. There were three 1000 candle power lights on poles 18 feet high nearby with the nearest being about 50 feet away.

Conclusions of Law (Lem Case.)

(1) Plaintiff occupied the status of a licensee—she may not recover because defendant owed plaintiff no duty other than—not exposing her to hidden perils.

(2) One—could not recover—even if she was an invitee, in absence of showing that United States failed *to exercise reasonable care in maintenance and inspection of area where injury occurred.*

Appellant affirms that the case at bar involves the same principles as the *Lem* case except that the decision in the *Lem* case should be reversed in the *Windsor* case for the following reasons:

1. Plaintiffs were invitees.
2. That defendant was directly responsible for the existence of the dangerous condition. *The drain or gutter was man-made.* The regulations in the Building Code were violated as to lighting.
3. The lessor, under the lease, retained control of all structures in the park and upon the penalty of full indemnity, placed upon the lessee the obligation to maintain the premises and keep them in repair.

Plaintiff, Herbert Windsor, qualified as an architect and engineer. [R. 48.] In his testimony [R. 55-56] he points out the failure of the National Park Service *to exercise reasonable care in the maintenance and inspection of area where injury occurred.* This testimony was unchallenged.

There is no legal justification in the declaration in subdivision (5), page 6. There is no testimony and no other evidence that supports the declarations.

1. That a marked means of ingress and egress was provided for patrons of the lodge.

2. That Baeda Windsor was in the act of taking a "short cut."

The only markings were for pedestrians crossing the street,—a cross walk. From the parking area, at any point along the concrete step, the way of approach was the same. After you crossed the street, the physical features were identical. The concrete step was the same dimension as was the platform. And the gutter ran right along directly adjacent to the concrete step—right through the cross walk. Where were the marked means that indicated a safe means of ingress?

If Baeda Windsor took a short cut where was the beaten path?

There was a railing on the outer edge of the porch. [R. 77.] There were three openings in the railing for sets of steps to the platform. [Exhibit 1.] There were no markings, signs or notices guiding a patron as he left the cafeteria. In the dusk cars were visible in outline, but there was no way of noting a cross walk and even if it could have been seen would the conduct of an ordinary adult prompt him to descend at the cross walk and walk along behind the cars?

Assume for the moment that a backing car had knocked the plaintiff to the pavement. Would the defense be any less rational to say that the plaintiff should not have been in a spot where the hazards from vehicles were more self-evident and pronounced?

Plaintiffs' Brief.

The main attack by Appellee upon Plaintiffs' Brief is that there is a conflict in the probative evidence. That by reason of the principle that an appellate court will not disturb the judgment of the lower court where the said probative evidence is conflicting, the judgment in the case of *Windsor v. United States* should be affirmed.

Appellee cites:

Bellon v. Silver Gate Theatres, Inc., 4 Cal. 2d 1;
Cleo Syrup Co. v. Coca-Cola Company, 139 F. 2d
416.

The first case, a jury case, had several doubtful points. Each element, favorable to the plaintiff, was met by an almost equivalent unfavorable response.

In the second case the issue was one to be solved by the preponderance of evidence as to whether the name Cleo-Cola was an infringement of the name Coca-Cola.

In the case at bar where is there any conflict in the probative evidence? Where in the Appellee's brief is there any contrary or conflicting evidence upon the issues of proximate cause?

Aetna Life Ins. Co. v. Kepler, 116 F. 2d 1.

4. Courts.

"In non-jury case, trial courts fact findings, unsupported by substantial evidence, clearly against weight of evidence, or induced by erroneous view of law, not binding on Circuit Court of Appeals."

Home Indemnity Co. v. Standard Acc. Ins. Co.,
167 F. 2d 919.

This case arose in the State of California.

In the opinion the Court of Appeals quotes from the case of *United States v. United States Gypsum Co.*, 68 S. Ct. 525:

“Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies, or by a jury, this court may reverse findings of fact by a trial court where clearly erroneous . . . A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”

See also:

Davis v. Lane, 24 Cal. App. 2d 400.

Conclusion.

Appellee has set forth four questions *in order to determine the issue of liability*.

The plaintiff-appellant has the burden of proof of Nos. (1), (2) and (3). The defendant-appellee has the burden of proof of No. 4.

(1) Has the court jurisdiction to make any findings? This is answered affirmatively by the case of *Home Indemnity Co.*

(2) What was the proximate cause of the injury? A gutter, without any covering or grating, improperly lighted, *man-made in the concrete pavement adjacent to a riser from which people step down from an elevation.*

(3) Was it caused by an employee of the defendant acting within the scope of his employment? Under the *Lem* case the answer is yes.

(4) Was there contributory negligence? Under the rules of this principle of law established in the case of *Breaks v. Anderson*, 95 A. C. A. 802 cited in Appellants' Opening Brief, the Appellee has unequivocally failed to establish any negligence by the plaintiff Baeda Windsor, which proximately was the cause of her injury.

At the terminus of any writing a proponent of some notion, policy or principal may endeavor to drive home those points he deems most favorable to the cause that he seeks to sustain. On the other hand he may, by so doing, point out the fatal weakness in his argument.

On page 10 Appellee declares:

“. . . that Baeda Windsor was caused to fall by her own carelessness, or by reason of some condition of the wooden platform or sidewalk, which was exclusively maintained by the . . . lessee.

“The evidence shows that the accident was caused solely . . . etc.

“We submit that in any event *the presence of a shallow depression or gutter . . . does not establish any negligence.*”

That which was the proximate cause of Plaintiff's injury could not be hidden by the many untenable positions that

Appellee has taken to sustain the judgment of the trial court.

The final line of Appellee's Brief sets forth a legal principle that is unknown to Appellant. There is as much logic in this statement, made by Appellee, as there is in the defense that the government should not be held liable for collision with a mail truck because the postoffice is operated at a pronounced deficit.

Respectfully submitted,

PERRY P. YOHE,

Attorney for Appellants.

No. 12469

United States
Court of Appeals
for the Ninth Circuit.

FRANK HYNES, Regional Director, Fish and
Wildlife Service, Department of Interior,

Appellant,

vs.

GRIMES PACKING CO., KADIAK FISHER-
IES COMPANY, LIBBY, McNEILL AND
LIBBY, FRANK McCONAGHY & CO., INC.,
PARKS CANNING CO., INC., SAN JUAN
FISHING & PACKING CO., and UGANIK
FISHERIES, INC.,

Appellees.

Transcript of Record

Appeal from the District Court
Territory of Alaska,
Fourth Division

FILED

APR -5 1950

PAUL P. O'BRIEN,
CLERK

No. 12469

**United States
Court of Appeals**
for the Ninth Circuit.

**FRANK HYNES, Regional Director, Fish and
Wildlife Service, Department of Interior,**

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**GRIMES PACKING CO., KADIAK FISHER-
IES COMPANY, LIBBY, McNEILL AND
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PARKS CANNING CO., INC., SAN JUAN
FISHING & PACKING CO., and UGANIK
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Transcript of Record

**Appeal from the District Court
Territory of Alaska,
Fourth Division**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 5505

GRIMES PACKING CO., et al,

Plaintiffs,

vs.

FRANK HYNES, etc.,

Defendant.

HEARING

Everett W. Hepp, Assistant U. S. Attorney, having moved the Court for an Order filing and spreading the Mandate from the Supreme Court in this cause on the record, the Court took the matter under advisement.

Entered July 19, 1949.

[Title District Court and Cause.]

ORDER RE MANDATE

The Court having on July 19, 1949, taken the matter under advisement of filing and spreading on the record the Mandate from the Supreme Court of the United States in this cause, and now being fully advised, it was Ordered that the Mandate be filed and spread upon the record.

Entered July 20, 1949.

Supreme Court of the United States
Oct. Term

FRANK HYNES, Regional Director, Fish and
Wildlife Service, Department of the Interior,
Petitioner,
vs.

GRIMES PACKING CO., Kadiak Fisheries Co.,
Libby, McNeill & Libby, et al.

SUMMARY
[No. 24.]

Argued October 21, 1948. Decided May 31, 1949.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review a judgment affirming a judgment of the District Court of the United States for the Territory of Alaska granting an injunction against enforcement of certain restrictive provisions of the 1946 Alaska Fisheries General Regulations. Vacated and remanded.

See same case below, 165 F2d 323, affirming 67 F Supp 43.

Roger P. Marquis, of Washington, D. C., argued the cause for petitioner.

W. C. Arnold and Frank L. Mechem, both of Seattle, Washington, argued the cause for respondents.

Mr. Justice Reed delivered the opinion of the Court.

The Secretary of the Interior on May 22, 1943,

issued Public Land Order 128. It is set out in full below.¹ In this case the significant part of No. 128 is that the Secretary included in the reservation by paragraph 2, adjacent tidelands and coastal waters along the entire shore line of the uplands that touched Shelikof Strait between Kodiak Island and the Alaska Peninsula. The authority of the Secretary to utilize presidential power in the designation of this reservation out of public lands in Alaska flows from a delegation to the Secretary of presi-

¹8 Fed Reg 8557:

“Alaska

“Modification of Executive Order Designating
Lands as Indian Reservation

“By virtue of the authority contained in the act of June 25, 1910, c 421, 36 Stat 847, as amended by the act of August 24, 1912, c 369, 37 Stat 497 (USC Title 43, secs 141-143), and the act of May 1, 1936, c 254, 49 Stat 1250 (USC Title 48, sec 358a), and pursuant to Executive Order No. 9146 of April 24, 1942: it is ordered, As follows:

“1. Executive Order No. 8344 of February 10, 1940, withdrawing Kodiak and other islands, Alaska, for classification and in aid of legislation, is hereby modified to the extent necessary to permit the designation as an Indian reservation of the following-described area:

“Beginning at the end of a point of land on the shore of Shelikof Strait on Kodiak Island, said point being about one and one-quarter miles east of Rocky Point and in approximate latitude 57° 39' 40" N., longitude 154° 12' 20" W.;

“Thence south approximately eight miles to latitude 57° 32' 30" N.;

“Thence west approximately twelve and one-half miles to the confluence of the north shore of Sturgeon River with the east shore of Shelikof Strait;

dential power to withdraw or reserve public lands and revoke or modify prior reservations. Executive Order No. 9146, of April 24, 1942, 1 CFR, Cum Supp 1149. The presidential power over reservations is made specific by the Act of June 25, 1910.² Another statutory provision, however, is the princi-

“Thence northeasterly following the easterly shore of Shelikof Strait to the place of beginning, containing approximately 35,200 acres.

“2. The area described above and the waters adjacent thereto extending 3,000 feet from the shore line at mean low tide, are hereby designated as an Indian reservation for the use and benefit of the native inhabitants of the native village of Karluk, Alaska, and vicinity: Provided, That such designation shall be effective only upon its approval by the vote of the Indian and Eskimo residents of the area involved in accordance with section 2 of the act of May 1, 1936, *supra*: And provided further, That nothing herein contained shall affect any valid existing claim or right under the laws of the United States within the purview of that section.”

²The first section reads as follows, 36 Stat 847, c 421:

“That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.”

There is a second section designed to keep the reservations free for mineral exploration and utilization.

pal basis for Order 128. This is § 2 of the Act of May 1, 1936, 49 Stat 1250, c 254. This act was passed to extend to Alaska the benefits of the Wheeler-Howard Act of June 18, 1934, 48 Stat 984, c 576, 25 USCA § 461, 5 FCA title 25, § 461, and to provide for the designation of Indian reservations in Alaska. As § 2 is important in our discussion, the pertinent provisions are set out in full:

“Sec. 2. That the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat 26), or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory: Provided, That the designation by the Secretary of the Interior of any such area of land as a reservation shall be effective only upon its approval by the vote, by secret ballot, of a majority of the Indian or Eskimo residents thereof who vote at a special election duly called by the Secretary of the Interior upon thirty days’ notice:”

The Native Village of Karluk held a meeting on May 23, 1944, and accepted “the proposed Indian Reservation for this village. The adoption of said

Reservation passed by a vote of 46 for and 0 against. 11 of the eligible voters were absent.” See note 26, *infra*. Under § 19 of the Wheeler-Howard Act, 25 USCA § 479, 5 FCA title 25, § 479, the Alaskan aborigines are classified as Indians.

On March 22 and August 27, 1946, the Secretary of the Interior amended the Alaska Fisheries General Regulations, 50 CFR 1946 Supp § 208.23, that related to the commercial fishing for salmon in the Kodiak Area Fisheries by the addition of a subsection (r), reading as follows:

“(r) All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait, on Kodiak Island, latitude 57° 32′ 30″ N., thence northeasterly along said shore to a point 57° 39′ 40″.

“The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat 1250, 48 USC 358a). Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative.”

The authority for the regulation is given as [June 14, 1906] 34 Stat 263, 264, c 3299, 48 USCA § 244, 5 FCA title 48, § 244, and [June 26, 1906], 34 Stat 478, c 3547, 48 USCA § 230, 5 FCA title 48, § 230, as amended by the Act of June 6, 1924, 43 Stat 464, c 272, an Act for the protection of the fisheries of

Alaska, known as the White Act.³ As the controlling section of this statute also is important, it is set out here,⁴ [June 18, 1926] 44 Stat 752, c 621, 48 USCA, 5 FCA title 48, § § 221, 222.

“Section 1. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the

³There is an amendment, immaterial here, see 44 Stat 752, c 621.

⁴Under Reorganization Plan No. II the authority of the Department of Commerce over the administration of the White Act was transferred to the Department of the Interior, effective July 1, 1939. 53 Stat 1431, § 4(e).

U. S. Commission of Fish and Fisheries
M. McDonald, Commissioner
CHART OF THE
LADIAK GROUP OF ISLANDS
ALASKA

TO ACCOMPANY REPORT
ON THE
SALMON FISHERIES



creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. . . ." See for definition of "several," 2 Blackstone's Commentaries 39, 40.

These are the statutes and orders that created the situation that led to this litigation.

The issuance of the White Act regulation of March 22, 1946, brought concern to the commercial fishing interests of Alaska. This was because of its drastic penalties. See note 49, *infra*. The native village of Karluk spoken of in Order No. 128, establishing the reservation is situated on the Karluk River, long recognized as one of the most important salmon spawning streams of Alaska. The natives live at its mouth on Shelikof Strait. There the salmon must congregate from the Strait to enter the channel of the river leading to their spawning grounds in the interior of Kodiak Island. The waters included in the reservation are those stretch-

ing eight miles along the coast north and south of the mouth, 3,000 feet into the Strait. Thus the best of the Karluk salmon fishery is put into the reservation by Order No. 128.⁵ For an understanding of the locality, a sketch map is appended.

The importance of the Karluk fishery will be appreciated by reference to a few of the facts in connection with it. When Russia ceded Alaska to the United States in [March 30] 1867, 15 Stat 539, Karluk was already well known as an abundant salmon fishery.⁶ By 1885 the salmon canneries were flourishing and Bancroft reports the Karluk pack at 36,000 cases out of a total of 65,000.⁷ The production continued large.⁸ The red salmon was most

⁵The river itself and all waters within 100 yards of its mouth are closed to all commercial salmon fishing. 50 CFR 1946 Supp § 208.23(d).

⁶Bancroft, *History of Alaska, 1730-1885*, p 228, note 12.

⁷*Id.* p 743.

⁸H Mis Doc No. 211, 51st Cong 1st Sess Report on the Salmon and Salmon Rivers of Alaska p 20:

“The number of salmon actually caught in Karluk Bay, near the river mouth and in the lower portion of the river, is so large as to make a true statement concerning them seem incredible. In 1888 the canneries put up over 200,000 cases, averaging about 13 red salmon to the case, or more than 2,500,000 fish. In 1889 the number of fish put up was still larger, reaching probably 250,000 cases, containing more than 3,000,000 salmon. As the number of fish arriving at Karluk Bay for a long period of years has been known to be far greater than in

prolific. There were variations in the catch but it was always valuable.⁹ In later years, the fluctuations continued and other varieties increased relatively.¹⁰

any of the other bays of southern Alaska, it is probable that most of these salmon were present at Karluk for the purpose of ascending the river to spawn. Now the number of spawning fish seen in the river, the lakes, and their connecting rivers was comparatively very small, indeed out of all proportion to the number taken on the beach."

⁹The highest reported by the Statistical Review of the Alaska Salmon Fisheries, June 13, 1930, Bureau of Fisheries Bulletin, vol XLVI, p 666, was nearly 4,000,000 fish in 1901 and the lowest about 400,000 in 1927. The report said:

"Many investigations of the Karluk red-salmon fishery have been made, much has been written about it, commercial interests have battled for exclusive control and domination of it, and dire prophecies have been heard concerning its ultimate destruction. Because of these things, Karluk has undoubtedly been given more close attention than any other fishery in Alaska. . . ."

¹⁰Unchallenged figures by plaintiffs show large catches. A table from the largest operator is printed for illustration.

"The total catch of fish taken within the area now included in the Karluk Indian Reservation during the years specified . . . :

	<i>Coho</i>	<i>Chum</i>	<i>Pink</i>	<i>King</i>	<i>Red</i>	<i>Total</i>
1941.....	1058	632	9893	134	59958	71675
1942.....	397	14556	225323	57	58042	298375
1943.....	83	825	2380	161	60273	63722
1944.....	33	5803	219300	69	63535	288400
1945.....	4	150	554	84	50907	51699
1946.....	137	8660	1024596	44	25381	1058818"

None of the respondent companies have packing plants at Karluk. All are, however, on Kodiak Island, which is around 100 miles long and 50 broad, and within fishing distance of the reservation waters. There is a fish refrigeration plant on the river. These canners have canned fish from these waters for from seven to twenty-four years. The percentage of each canner's pack that comes from the reserved waters is so large that the trial court found irreparable injury to the packers if they could not obtain the catch of the reservation. ". . . no other replacement source of such salmon for their canneries on Kodiak Island is available to them." The canners' investment is substantial, running from two to five hundred thousand dollars respectively. The fishing is done by men who own their own three- to four-man boats, use similar company boats or operate under boat buying contracts. Prices for the catch vary for these classifications. These packers employ over four hundred fishermen, chiefly residents of Alaska and over six hundred cannery employees, chiefly nonresidents.

The fishing season at Karluk begins around June 1 and continues intermittently, depending upon the run of fish, until Sept. 30. After the issuance of § 208.23 (r) restricting the fishery at Karluk Reservation to Karluk natives and licensees, respondents brought this action against the Regional Director for the Territory of Alaska of the Fish and Wildlife Service to permanently enjoin the exclusion of their fishermen from the reservation on the ground

that neither regulation § 208.23 (r) nor Public Land Order No. 128 legally closed the fishery of the coastal waters to respondents. The District Court granted the permanent injunction and held invalid both the regulation and the land order. 67 F Supp 43. On the same grounds the Court of Appeals for the Ninth Circuit affirmed the order for permanent injunction. 165 F2d 323.

I.

(a) At the outset the United States contends that the Secretary of the Interior is an indispensable party who must be joined as a party defendant in order to give the District Court jurisdiction of this suit. In *Williams v. Fanning*, 332 US 490, 92 L ed 95, 68 S Ct 188, the test as to whether a superior official can be dispensed with as a party was stated to be whether "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." P 494. Such is the precise situation here. Nothing is required of the Secretary; he does not have to perform any act, either directly or indirectly. Respondents merely seek an injunction restraining petitioner from interfering with their fishing. No affirmative action is required of petitioner, and if he and his subordinates cease their interference, respondents have been accorded all the relief which they seek. The issues of the instant suit can be settled by a decree between these parties without having the Secretary of the Interior as a party to the litigation.

(b) Petitioner, Regional Director for the Territory of Alaska of the Fish and Wildlife Service of the Interior Department, is charged with the duty of enforcing the acts of Congress relating to the fisheries of Alaska and regulations issued thereunder. The District Court found that since March 22, 1946, the effective date of § 208.23 (r) of the Alaska Fisheries General Regulations, petitioner has continually threatened the seizure of all boats and equipment used to fish in the waters covered by this regulation to respondents' substantial and irreparable loss, and that the seasonal run of salmon in the reservation waters was essential for respondents' profitable operation. From the following facts it will be seen that there is sufficient evidence to support these findings.

After the promulgation of the fishery regulation, § 208.23 (r), the Warden for the Fish and Wildlife Service on Kodiak Island, one of petitioner's subordinate agents, repeatedly informed officials of the canneries that the regulation would be enforced and that the necessary steps would be taken to prosecute any violations. He communicated to the representatives of the canneries the contents of a telegram in which petitioner directed that a case to test the regulation be arranged for the opening day of the fishing season. The contents of this telegram were relayed to the headquarters in Seattle of the Alaska Salmon Industry, Inc., a trade association of the canned salmon packers of which all but one of respondents are members. Thence the

information was distributed to all interested parties. The Kodiak warden then reiterated to the cannery operators on that island his intention to enforce the regulation even though his force and equipment were inadequate for the purpose.

Thereafter two officers of the Indian Service were appointed special agents for the Fish and Wildlife Service to assist in the enforcement of the fishing regulations issued by the Interior Department. They arrived at Karluk June 24, 1946. These two deputies were armed and maintained a boat patrol in the waters of the reservation. They checked the names of boats fishing in the waters of the reservation against the permits issued by the village of Karluk. No boats were allowed inside the area which had been restricted for beach seining by vote of the Indian meeting of May 23, 1944,¹¹ and which was marked off by buoys.

¹¹Minutes of Meeting:

* * *

“A meeting was called by the president and the same evening with Mr. Peters, Mr. Watrous of Juneau and Mr. Leraas present. Following discussion and action:

“1. The problems of setting aside an area for beach seining were discussed. It was agreed that 1000 yd. from the mouth of the river up the spit and from the mouth of the river to Julia Fort point approximately 500 yd. on the Improvement side, placing markers or buoys 500 yd. out from mean low water mark be the restricted area for Karluk beach seining only. Purse seining could be done outside this restricted area this year or until further action by the council.”

* * *

If respondents show that they are without an adequate remedy at law and will suffer irreparable injury unless the enforcement of the alleged invalid regulation is restrained, a civil court will enjoin.¹² While ordinarily criminal prosecutions will not be restrained even under an invalid statute,¹³ a civil action will lie in exceptional circumstances that make an injunction necessary to effectually protect property rights.¹⁴

The facts heretofore detailed as to the investments of respondents in canneries and fishing equipment and their established activities in the waters of the reservation make clear the serious effect on them of exclusion from the reservation. It is not a threat of a single prosecution, as in the Spielman Case, but an ousting of respondents and their employees from the fishing grounds unless each individual

¹²See *Terrace v. Thompson*, 263 US 197, 214, 68 L ed 255, 273, 44 S Ct 15; *Petroleum Exploration v. Public Serv. Commission*, 304 US 209, 217, 219, 82 L ed 1294, 1300, 1301, 58 S Ct 834.

¹³*Watson v. Buck*, 313 US 387, 85 L ed 1416, 61 S Ct 962, 136 ALR 1426; *Re Sawyer*, 124 US 200, 31 L ed 402, 8 S Ct 482.

¹⁴*Parker v. Brown*, 317 US 341, 87 L ed 315, 63 S Ct 307; *Packard v. Banton*, 264 US 140, 68 L ed 596, 44 S Ct 257; *Truax v. Raich*, 239 US 33, 60 L ed 131, 36 S Ct 7, LRA1916D 545, Ann Cas 1917B 283; *Philadelphia Co. v. Stimson*, 223 US 605, 620, 56 L ed 570, 576, 32 S Ct 340, second. Cf. *Watson v. Buck*, 313 US 387, 400, 85 L ed 1416, 1423, 61 S Ct 962, 136 ALR 1426; *Spielman Motor Sales Co.*

person takes a fishing license. Under the findings the respondents could not operate profitably if prohibited from fishing in the reservation area. Many fishermen may stay away from the grounds for fear of punishment. In the pursuit of their otherwise lawful business respondents are threatened with criminal prosecution should they fish in the waters of the Karluk Reservation without a permit from the native village. For the violation of the applicable regulation under the White Act, severe penalties are imposed including fine, imprisonment, the summary seizure of boats, haul, gear, equipment, and their forfeiture to the United States.¹⁵ These sanctions deny to respondents an adequate remedy at law for to challenge the regulation in an ordinary criminal proceeding is to hazard a loss against the payment of a license fee and compliance with the fishing rules of the natives. Yet to stay out of the reservation prevents the profitable operation of the canneries. In such a situation a majority of the Court thinks that the "danger of irreparable loss is both great and immediate" and properly calls forth the jurisdiction of the court of equity.¹⁶

v. Dodge, 295 US 89, 79 L ed 1322, 55 S Ct 678; *Stainback v. Mo Hock Ke Lok Po*, No 474, this Term, decided March 14, 1949 [336 US 368, ante, 579, 69 S Ct 606].

¹⁵43 Stat 466, c 272, 48 USCA § 226, 5 FCA title 48, § 226.

¹⁶*Parker v. Brown*, *supra* (317 US 349, 87 L ed 324, 63 S Ct 307). Seizure of a fisherman's boat is

II.

Respondents sought this injunction forbidding criminal proceedings aimed at excluding them from fishing in the coastal waters of Karluk Reservation on the ground that Public Land Order No. 128, note 1, *supra*, was invalid as a whole and particularly because of the inclusion of tidelands and coastal waters by § 2 of the order.

Respondents attack in their complaint the validity of the entire order because “no part of the land area involved had been withdrawn by Executive Order and placed under the jurisdiction of the Department of the Interior prior to May 1, 1936, as required by the Act of May 1, 1936.” This position has not been pressed or decided.¹⁷ The final order for an injunction against petitioner does not include any ruling on that point.

Nor do we think the authority of the Secretary of the Interior to establish the Karluk Reservation, Public Land Order 128, by virtue of the use and occupancy of the area by the natives under § 8 of the Act of May 17, 1884, 23 Stat 24, 26, c 53, 48 USCA § 356, 5 FCA title 48, § 356, or §§ 14 or 15 of the Act of March 3, 1891, 26 Stat 1095, 1101, c 561, 48 USCA § 358, 5 FCA title 48, § 358, need be decided. While the point is referred to in the briefs,

a drastic sanction. See Hearings before the subcommittee on Alaskan fisheries of the Committee on Merchant Marine and Fisheries, 76th Cong 1st Sess pp 45-47.

¹⁷67 F Supp 43; 165 F2d 323.

no such issue was tendered by the complaint; no such point was raised by the assignments of error; the question was specifically pretermitted by the opinion of the Court of Appeals, 165 F2d at 325; it is not included in the questions presented by the petition for certiorari and is not relied upon by the respondents to require affirmance of the Court of Appeals decree.

(a) The validity of Public Land Order 128 depends in this case on the scope of the power granted to the Secretary to establish this reservation by the language of § 2 of the Act of May 1, 1936, *supra*, authorizing the Secretary of the Interior to designate as a reservation "any other public lands which are actually occupied by Indians or Eskimos within said Territory." An administrative order is presumptively valid.¹⁸

In this instance, the Secretary acted by statute, § 2, Act of May 1, 1936, and through delegation of presidential authority.¹⁹ This delegation in turn

¹⁸*Thompson v. Consolidated Gas Utilities Corp.* 300 US 55, 69, 81 L ed 510, 517, 57 S Ct 364; *Pacific States Box & Basket Co. v. White*, 296 US 176, 185, 80 L ed 138, 146, 56 S Ct 159, 101 ALR 853; *Wampler v. Lecompte*, 282 US 172, 175, 75 L ed 276, 278, 51 S Ct 92; *Martin v. Mott*, 12 Wheat (US) 19, 32, 61 L ed 537, 541.

¹⁹Executive Order 9146, 1 CFR Cum Supp p 1149: "By virtue of the authority vested in me by the act of June 25, 1910, c 421, 36 Stat 847, and as President of the United States, I hereby authorize the Secretary of the Interior to sign all orders with-

rested on the Act of June 25, 1910, 36 Stat 847 c 421.²⁰ This chain of delegated authority for the allocation of public lands in Alaska retains for future congressional action the power for the ultimate disposition of the property, land and water, within the boundaries of the reservation. Withdrawals under the Act of June 25, 1910, are "temporary" and "until revoked by him or by an Act of Congress."

The Wheeler-Howard Act of June 18, 1934, "To conserve and develop Indian lands and resources," which was extended to the Territory of Alaska by § 1 of the Act of May 1, 1936, authorized the Secretary of the Interior to restore to tribal ownership only the remaining surplus lands of any Indian reservation theretofore opened for sale or other disposition.²¹ It did not authorize the creation of

drawing or reserving public lands of the United States, and all orders revoking or modifying such orders: . . ."

Executive Order 8344, 1 CFR 1940 Supp p 101, referred to in Public Land Order 128, temporarily withdrew Kodiak Island from settlement, location, sale or entry for classification.

²⁰So far as material that act is set out in note 2, *supra*.

²¹It is unnecessary to appraise the effect of such restoration. Tribal ownership may vary from an unrecognized Indian title, see *Northwestern Bands of Shoshone Indians v. United States*, 324 US 335, 338, 340, 89 L ed 985, 989, 990, 65 S Ct 707, to land so set apart to an Indian tribe by definitive treaty

reservations of any kind. Its only reference to acquisition of lands by or for Indians is in § 5, 25 USCA § 465, 5 FCA title 25, § 465, where appropriations are authorized for that purpose. This section is inapplicable here.

Section 2 of the extending act, set out at the beginning of this opinion, page 968, *supra*, gives no power to the Secretary to dispose finally of federal lands. By the new section he is authorized simply "to designate as an Indian reservation" any other public lands which are actually occupied by Indians or Eskimos within said Territory. There is no language in the various acts, in their legislative history, or in the Land Order 128, from which an inference can be drawn that the Secretary has or has claimed power to convey any permanent title or right to the Indians in the lands or waters of Karluk Reservation. Rather the contrary is true. In the Act of May 14, 1898, 30 Stat 409, c 299, 48 USCA § 411, 5 FCA title 48, § 411, "Extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," there is the express proviso that nothing

as to require compensation to the tribe, if the United States thereafter appropriated lands within the area. See *Shoshone Tribe v. United States*, 299 US 476, 486, 81 L ed 360, 363, 57 S Ct 244; [March 3, 1927] 44 Stat 1349, c 302. The effect of restoration under the Wheeler-Howard Act will depend upon the provisions of law under which the separate reservations exist. Compare Cohen, *Handbook of Federal Indian Law* c 5, § 5A, p. 94.

contained in the Act "shall be construed as impairing in any degree the title of any State that may hereafter be erected out of the Territory of Alaska, or any part thereof, to tide lands and beds of any of its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said Territory. The term 'navigable waters,' as herein used, shall be held to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary high-water mark." Indeed the United States affirms in its brief that Karluk Reservation is merely a reservation "for a particular governmental use," not a disposal of the area. The government says it is like *Sioux Tribe v. United States*, 316 US 317, 86 L ed 1501, 62 S Ct 1095, not like *United States v. Holt State Bank*, 270 US 49, 70 L ed 465, 46 S Ct 197.

An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim. *Sioux Tribe v. United States*, 316 US 317, 86 L ed 1501, 62 S Ct 1095; see *United*

States v. Santa Fe P. R. Co. 314 US 339 at 347, 86 L ed 260, 270, 62 S Ct 248.²² When a reservation is established by a treaty ratified by the Senate or a statute, the quality of the rights thereby secured to the occupants of the reservation depends upon the language or purpose of the congressional action.²³ Since Congress, under the Constitution, § 3 of Art 4, has the power to dispose of the lands of the United States, it may convey to or recognize such rights in the Indians, even a title equal to fee simple, as in its judgment is just. *Northwestern Bands of Shoshone Indians v. United States*, 324

²²Possible claims under the Indian Claims Commission Act of Aug 13, 1946, are not covered by this statement. See 60 Stat 1049, 1050, c 959, § 2 (5), 25 USCA § 70 a, 5 FCA title 25, § 70 a. It refers to claims "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission."

²³*United States v. Shoshone Tribe*, 304 US 111, 116, 82 L ed 1213, 1218, 58 S Ct 794; *Shoshone Tribe v. United States*, 299 US 476, 485, 486, 492, 81 L ed 360, 363, 364, 366, 57 S Ct 244 First; *United States v. Creek Nation*, 295 US 103, 109, 79 L ed 1331, 1335, 55 S Ct 681; *United States v. Holt State Bank*, 270 US 49, 58, 70 L ed 465, 470, 46 S Ct 197; *Confederated Bands of Ute Indians v. United States*, 330 US 169, 176, 91 L ed 823, 828, 67 S Ct 650 et seq.; *Arenas v. United States*, 322 US 419, 88 L ed 1363, 64 S Ct 1090; opinions on remand, *United States v. Arenas* (CCA9th Cal) 158 F2d 730; *Arenas v. United States* (DC Cal) 60 F Supp 411.

US 335, 339, 340, 89 L ed 985, 990, 991, 65 S Ct 690. When Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find definite indications of such a purpose.²⁴

In the present case a determination of the power delegated to the Secretary of the Interior by the Wheeler-Howard Act of June 18, 1934, and § 2 of the Act of May 1, 1936, is important. It is important for the reason that a statute that authorizes permanent disposition of federal property would be most strictly construed to avoid inclusion of fisheries by implication. Petitioner argues for a holding that the power granted covers water as well as land. If that power were broad enough to enable the Secretary to designate nonrevocable or permanent reservations of all Alaska fishing grounds for the sole

²⁴For example in the Arenas Case, 322 US 419, 88 L ed 1363, 64 S Ct 1090, the statute read:

“Sec. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. . . .” P 422.

benefit of natives living in villages adjacent to the fisheries, it might place in his hands the power to grant the natives the right to exclude all other fishermen from the fisheries. In this present case, for example, it might mean that the native residents of the Karluk Reservation would have the perpetual use and enjoyment of this valuable Karluk fishery for themselves and their licensees.²⁵ On May 23, 1944, a year after Public Land Order 128, the petitioner shows that there were 57 residents eligible to vote for approval of the designation of the reservation.²⁶ As indicated by the cases hereinbefore cited, a recognition of such ownership in Indians might require just compensation to them of the fair value

²⁵One gets a sense of its value from the catch of a single operator. Note 10, *supra*.

²⁶We understand, although it is not a fact of weight, that the number includes both men and women over twenty-one. 49 Stat 1250, 1251, c 254, 48 USCA § 358 a, 5 FCA title 48, § 358 a; Constitution and By-Laws of the Native Village of Karluk, Alaska, Official Publication, United States Department of the Interior, Office of Indian Affairs, GPO (1939); Constitution, Art. 5, § 1; Certificate of Adoption, p 4; [June 18, 1934] 48 Stat 984, 986, 987, c 576, §§ 13 and 16, 25 USCA §§ 473 and 476, 5 FCA title 25, §§ 473 and 476.

The population of Karluk around 1880 was 302. Report on the Population, Industries, and Resources of Alaska by Ivan Petroff, p 37, HR Misc Doc 42, P 8, 47th Cong 2d Sess. In 1920 it was 99; in 1929 it was 192; in 1939 it was 189. 16th Census of the United States (1940), Population, vol 1, Number of Inhabitants, p 1193.

of the fishery, if the United States should desire hereafter to reopen the area to the public under its regulations. There is much less reason to read such power of permanent disposition by the Secretary into § 2 than there was to read it into the President's "implied grant of power" to create reservations. *United States v. Midwest Oil Co.* 236 US 459, 475, 59 L ed 673, 682, 35 S Ct 309. It would take specific and unambiguous legislation to cause us to rule that Congress intended to authorize the Secretary of the Interior to alienate the Alaska fisheries permanently from public control.²⁷ The

²⁷In the Act of May 14, 1898, 30 Stat 409, c 299, 48 USCA § 371, 5 FCA title 48, § 371, which extended the homestead land laws of the United States to Alaska, it was specifically provided that "no entry shall be allowed extending more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims, and that nothing herein contained shall be so construed as to authorize entries to be made, or title to be acquired, to the shore of any navigable waters within said District:"

argument that Congress did not intend to authorize the designation of water or fisheries as a part of an Indian reservation has behind it the unarticulated premise that the United States must have complete power to protect, improve and regulate for the good of all our people these unrivalled sea fisheries with their wealth of food. It loses much of its force by our conclusion that Alaskan Indian

reservations, established or enlarged under § 2 are subject to the unfettered will of Congress.²⁸

(b) An argument that the reservation is a non-revocable grant can be made. Under the Act of June 18, 1934, § 16, applicable to Alaska, see § 13, an Indian tribe was authorized to adopt a constitution and by-laws for its government. This was done by the Karluk Reservation Indians. There is a phrase in the section that has color of recognition

²⁸Compare the statute creating the Metlakahtla Reservation, 26 Stat 1095, 1101, c 561, 48 USCA § 358, 5 FCA title 48, § 358:

“Sec. 15. That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon’s entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may [be] prescribed from time to time by the Secretary of the Interior.” See [March 4, 1907] 34 Stat 1411, c 2929, 46 USCA § 237, 10 FCA title 46, § 237, and [May 7, 1934] 48 Stat 667, c 221.

See a discussion of the limited power of the President to create even temporary reservations for Indian immigrants. 18 Ops Atty Gen (F) 557.

We have carefully considered the opinion in *Miller v. United States* (CCA 9th Alaska) 159 F2d 997, where it is held, p 1001, that the Indian right of occupancy of Alaska lands is compensable. With all respect to the learned judges, familiar with Alaska land laws, we cannot express agreement with that conclusion. The opinion upon which they chiefly

of ownership of tribal lands in the Indians. It reads as follows:

“In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; . . .” 48 Stat 987, c 576, 25 USCA § 476, 5 FCA title 25, § 476.²⁹

We think, however, in view of the breadth of the coverage of the Wheeler-Howard Act that this language would be effective only where there has

rely, *United States v. Alcea Band of Tillamooks*, 329 US 40, 91 L ed 29, 67 S Ct 167, is not an authority for this position. That opinion does not hold the Indian right of occupancy compensable without specific legislative direction to make payment. See also *United States v. 10.95 Acres of Land in Juneau, DC Alaska*, 75 F Supp 841.

²⁹In Hearings before Senate Committee on Indian Affairs, 73d Cong 2d Sess on S 3645, the bill which became the Act of June 18, 1934, p 247, the following discussion took place as to the meaning of these words:

“Senator O’Mahoney. But what you are saying here is that the constitution shall vest in some person—what? The following rights and powers. And then you undertake to enumerate those powers. The first one that you enumerate is the right to employ counsel. The second one is the right to prevent individuals from selling and disposing of their property. Then you come to a third one and it is to represent

been specific recognition by the United States of Indian rights to control absolutely tribal lands.

Persuasive of this conclusion is that the bill when originally introduced by Interior provided in § 7 of Title III that "Title to any land acquired pursuant to the provisions of this section shall be taken in the name of the United States in trust for the Indian tribe or community for whom the land is acquired, *but title may be transferred by the Secretary to such community under the conditions set forth in this Act.*" The italicized words were omitted when this section was incorporated into § 5 of the Wheeler-Howard Act. See Hearings before House Committee on Indian Affairs, 73d Cong 2d Sess on HR 7902, p 9.

Turning to § 2 of the Act of May 1, 1936, the strongest argument for the nonrevocability of a reservation; created under § 2 of that Act comes from a letter of the Secretary of the Interior printed in the House and Senate Reports on the bill which became the Act in question.³⁰ The reports, speaking of § 2, said:

the tribe, and that seems to me to be hanging up in the air.

"The Chairman. The second one you stated incorrectly.

"Senator O'Mahoney. Have I?

"The Chairman: It is not to prevent them from selling individual lands; it is tribal lands.

"Senator O'Mahoney. Yes, that is right; tribal lands."

³⁰HR Rep No 2244 on HR 9866, 74th Cong 2d Sess
Sen Rep No 1748 on S 4420, 74th Cong 2d Sess.

“This provision in reality carries out the promise of this Government contained in its act approved on May 17, 1884 (23 Stat 26), as follows:

“ ‘Provided, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.’ ” HR Rep No 2244, 74th Cong 2d Sess p 3.

The pertinent part of the letter is set out below.³¹ The legislation was, of course, a fulfillment of the aid foreshadowed in the statutes referred to in the

³¹“An even more important reason for the designation of reservations in Alaska is that by doing so the United States Government will have fulfilled in part its moral and legal obligations in the protection of the economic rights of the Alaska natives. In at least two acts of Congress this obligation is specifically acknowledged. The act approved on May 17, 1884 (23 Stat 26), contains the following language: ‘Provided, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.’

“The act of March 3, 1891 (26 Stat 1100), contains similar language: ‘That none of the provisions of the last two preceding sections of this Act shall be so construed as to warrant the sale of any lands belonging to the United States which shall contain coal or the precious metals, or any townsite, or which shall be occupied by the United

letter. Such references to general legislation on public lands in the huge Territory of Alaska, however, cannot be treated as an adequate basis for courts to declare that power was given the Secretary of the Interior to dispose finally of Alaska lands. The first section of the Act of May 1 was a mere amendment of the Wheeler-Howard Act to bring Alaska under its coverage. The Wheeler-Howard Act did not authorize the creation of Indian reservations. Section 2 of the act extending the Wheeler-Howard Act to Alaska was intended to permit the organization of the Alaska natives so that they could avail themselves of the earlier Act.³² It can-

States for public purposes, or which shall be reserved for such purposes, or to which the natives of Alaska have prior rights by virtue of actual occupation.' Lands which should have been, by virtue of these acts, segregated for natives of Alaska have not been so segregated. The provisions of section 2 of HR 9866 will aid the Federal Government in rectifying this condition, and in protecting the interests of the natives in the future. Section 2 of the bill which gives to the Secretary of the Interior power to designate certain lands as Indian reservations is, therefore, a logical sequence of the legislative history regarding Indian lands in Alaska and provides a method by which the financial aid provisions of the Indian Reorganization Act may be extended to those Indians and Eskimos of Alaska who occupy established villages."

³²This appears from the following excerpt from the Secretary's letter:

"Indian tribes do not exist in Alaska in the same sense as in continental United States. Section 19 of the Indian Reorganization Act defines the word 'tribe' as referring to 'Any Indian tribe, organized

not be said, we think, that such reservations may be permanent or nonrevocable. A reading of § 2 will show that there are no words with the connotation of recognition or conveyance of title. There are no words, such as appear in other statutes,³³ reserving the right of exploration, discovery and claim for precious metals and valuable minerals. There is no discussion in the reports or the debates that show a definite intention of anyone to part with public property to establish an Alaskan Indian communal system. Under such circumstances, we think the land and water reservations created under § 2 are reservations at will.

(c) We are convinced that § 2 of the Act of May 1, 1936, authorizes the Secretary of the Interior to include in the Karluk Reservation the waters described in § 2 of Public Land Order No. 128. To

band, pueblo, or the Indians residing on one reservation,' With a few exceptions the lands occupied by natives of Alaska have not been designated as reservations. In order, therefore, to define an Alaskan tribe it is necessary to identify it with the land it occupies and in terms of the language of the act, 'reservation.' In addition, if native communities of Alaska are to set up systems of local government, it will be necessary to stipulate the geographical limits of their jurisdictions. Reservations set up by the Secretary of the Interior will accomplish this." This, with the proviso of the first section, was deemed sufficient to enable the lands to be identified and to permit the Wheeler-Howard benefits to be available to the Alaska natives.

³³36 Stat 847, c 421, § 2, 43 USCA § 142, 9A FCA title 43, § 142.

interpret the clause "or any other public lands which are actually occupied by Indians or Eskimos within said Territory" to describe only land above mean low tide is too restrictive in view of the history and habits of Alaska natives and the course of administration of Indian affairs in that Territory. The title to the uplands and waters in question is in the United States.³⁴ The fisheries as well as the uplands are subject to its present control.³⁵ In [July 27] 1868 Congress extended our laws relating to customs, commerce and navigation over the "mainland, islands, and waters of the territory." 15 Stat

³⁴Treaty with Russia, proclaimed June 20, 1867, 15 Stat 539, 541, 542:

Art. II. "In the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property. . . ."

Art. III. "The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."

³⁵*Alaska Pacific Fisheries v. United States*, 248 US 78, 87, 63 L ed 138, 140, 39 S Ct 40; *Shively v.*

240, c 273. The seal islands and the waters adjacent thereto were promptly made a reservation for the preservation and exploitation of the seal fishery. [March 3, 1869] 15 Stat 348, [July 1, 1870] 16 Stat 180, c 189. A civil government for the new territory was set up in [May 17] 1884. 23 Stat 24, c 53. In that act appeared the proviso referred to *supra*, note 31, in the letter of the Secretary of the Interior. By § 12 a commission was empowered to report upon the condition of the Indians.³⁶ On June

Bowlby, 152 US 1, 47, 38 L ed 331, 348, 14 S Ct 548, and cases cited; *Mann v. Tacoma Land Co.* 153 US 273, 283, 38 L ed 714, 717, 14 S Ct 820. See also *Tulee v. Washington*, 315 US 681, 86 L ed 1115, 62 S Ct 862. In *Knight v. United Land Asso.* 142 US 161, 35 L ed 974, 12 S Ct 258, the Court said, p 183: "Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory." In *Alaska Pacific Fisheries v. United States*, 248 US 78, 63 L ed 138, 39 S Ct 40, *supra*, the statement is made, p 87, "That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement. All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had completed legislative authority." Compare also *Borax Consolidated v. Los Angeles*, 296 US 10, 15, 80 L ed 9, 13, 56 S Ct 23.

³⁶23 Stat 27, c 53.

"Sec. 12. That the Secretary of the Interior shall select two of the officers to be appointed under this

30, 1885, the Commission reported to the Secretary of the Interior as to the fisheries in the words in the margin below.³⁷

By virtue of § 15 of the act of Congress of March 3, 1891, *supra*, note 28, the Congress set apart the "body of lands known as Annette Islands" in Alaska for a reservation for the Metlakahtla Indians. Nothing was said as to fishing rights. A presidential proclamation of April 28, 1916, reserved to them the surrounding waters within 3,000 feet.

act, who, together with the governor, shall constitute a commission to examine into and report upon the condition of the Indians residing in said Territory, what lands, if any, should be reserved for their use, what provision shall be made for their education, what rights by occupation of settlers should be recognized to enable Congress to determine what limitations or conditions should be imposed when the land laws of the United States shall be extended to said district; and to defray the expenses of said commission the sum of two thousand dollars is hereby appropriated out of any moneys in the Treasury not otherwise appropriated."

³⁷"The General Land Laws of the United States should be extended over the Territory as early as possible. The natives claim only the land on which their houses are built and some garden patches near their villages; they ask or expect nothing more. A deed for their lots in severalty would be a very highly prized document by them. The fisheries occupied by them before the advent of the Whites should also be secured to them against encroachment. They ask only the same rights and protection given the white man."

39 Stat 1777.³⁸ After the proclamation a proceeding was brought by the United States relying upon the statute and proclamation to oust a fish trap of the Alaska Pacific Fisheries from the waters mentioned in the proclamation. Such a decree was obtained in the District Court and affirmed by the United States Court of Appeals for the Ninth Circuit on the ground "that the reservation of Annette Island by the act of Congress, and of its surrounding waters by the President's proclamation, is fully

³⁸ "Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation; also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands, to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

"Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned."

A presidential proclamation had theretofore [Dec. 24] 1892, set apart Afognak Island, Alaska, and its adjacent bays and territorial waters as a public reservation for fish culture without specific authority to reserve waters. 27 Stat 1052.

sustained.” *Alaska Pacific Fisheries v. United States* (CCA9th) 240 F 274, 283. For the validity of the proclamation reliance was placed upon his power to reserve lands for reservations without specific authority. See *United States v. Midwest Oil Co.* 236 US 459, 59 L ed 673, 35 S Ct 309, *supra*. This Court affirmed the decree as to the waters within 3,000 feet of the shore lines. Although in the brief a vigorous attack was made on the power to issue the proclamation covering the waters, the proclamation was not referred to in the unanimous opinion here. This Court felt compelled to decide the fisheries were included in the language of the statute by the purpose to assist the Indians to train themselves. Fishing was said to give value to the islands. “The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location.” *Alaska Pacific Fisheries v. United States*, 248 US 78, 89, 63 L ed 138, 141, 39 S Ct 40.

The conditions as to the waters around the Annette Islands closely parallel those of other Alaska areas actually occupied by natives. The Annette Islands case was relied upon by the Secretary of the Interior for his authority to include the fisheries under § 2 of the Act of May 1, 1936. 56 Int Dept 110. The Alaska aborigines, like the Metlakahtlans, are fishermen. They, too, depend upon the waters for a large part of their support. For them the adjacent fisheries are as important, perhaps more

important than the forests, the furbearing animals or the minerals.

Respondents urge upon us the cases in this and other courts which have held that the phrase "public lands," the term now under consideration, used in § 2 of the Act of May 1, 1936, does not include any area extending below mean high tide.³⁹ As the respondents state, this case turns not on tidelands, the area between mean high and mean low tides, but on whether the Secretary could include coastal waters in the reservation, i.e., the area "3000 feet from the shore line at mean low tide." As we understand respondents' argument and as we see this case, the question of tidelands is not significant. Reference to *Mann v. Tacoma Land Co.* 153 US 273, 283, 38 L ed 714, 717, 14 S Ct 820, will make clear respondents' position. Before the admission of Washington to statehood, Nov. 11, 1889, 26 Stat 1552, the

³⁹*Borax Consolidated v. Los Angeles*, 296 US 10, 17, 22, 80 L ed 9, 15, 17, 56 S Ct 23. This case turned on the power of the United States to convey tideland seaward of the line of mean high tide after California's admission to the Union. Public lands there could not include tidelands as they passed to California when she became a state. The cases cited in the Borax Case to support the statement as to public lands are cases that have nothing to do with tidelands or coastal waters but depend upon whether the lands in question were subject to disposal as property of the United States, i.e., public lands. See *Newhall v. Sanger*, 92 US 761, 763, 23 L ed 769, 770; *Barker v. Harvey*, 181 US 481, 490, 45 L ed 963, 968, 21 S Ct 690; *Union P. R. Co. v. Harris*, 215 US 386, 388, 54 L ed 246, 247, 30 S Ct 138.

United States issued land scrip to Mann for location on "unoccupied and unappropriated public lands" and the holder made location on tidelands and received the register's certificate therefor. When Mann sought to restrain trespass on the land so obtained, this Court held: "It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands. There is nothing in the act authorizing the Valentine scrip, or in the circumstances which gave occasion for its passage, to make an exception to the general rule." P 284. Respondents assert that the reference to public lands in § 2 should be construed in the same manner since the federal land laws apply to Alaska⁴⁰ as do the reasons for excluding waters seaward of mean high tide.⁴¹

The Government points out that the cases relating to the limits of "public lands" are cases where final disposition not temporary use of the lands appeared. When one deals with a statute so large in purpose as to justify the above-quoted comment of

⁴⁰Act of May 14, 1898, c 299, 30 Stat 409, 48 USCA § 371, 5 FCA title 48, §371 (homestead laws); Act of March 3, 1899, c 424, 30 Stat 1098, 48 USCA § 371, 5 FCA title 48, § 371 (homestead surveys); Act of March 2, 1907, c 2537, 34 Stat 1232, 48 USCA § 365, 5 FCA title 48, § 365 (land districts).

⁴¹See also *Miller v. United States* (CCA 9th Alaska) 159 F2d 997; *supra*, p —; *Heckman v. Sutter* (CCA 9th) 128 F 393.

the Secretary of the Interior that it “provides a method by which the financial aid provisions of the Indian Reorganization Act may be extended to those Indians and Eskimos of Alaska who occupy established villages,” one may not fully comprehend the statute’s scope by extracting from it a single phrase, such as “public lands” and getting the phrase’s meaning from the dictionary or even from dissimilar statutes. Section 2 of the Act of May 1, 1936, is but one of a series of enactments relating to Alaska natives, lands and fisheries. It must “be taken as intended to fit into the existing system” and interpreted in that aspect.⁴² There is nothing that we have found in the statute or the legislative history to justify the significance put upon the use of the words “public lands” in the clause of § 2 under discussion instead of “lands” used in the preceding clauses. If a differentiation was intended, surely it would have been more definitely expressed.

Taking into consideration the importance of the fisheries to the Alaska natives, the temporary character of the reservation, the Annette Islands case, the administrative determination, the purpose of Congress to assist the natives by the Alaska amendment to the Wheeler-Howard Act, we have concluded that the Secretary of the Interior was authorized to include the waters in the reservation. No injunction therefore may be obtained because of the invalidity of Order No. 128.

⁴²Cf. *United States v. Jefferson Electric Mfg. Co.* 291 US 386, 397, 78 L ed 859, 869, 54 S Ct 443.

III.

Subdivision II of this opinion has been directed toward the determination of the scope of § 2 of the Act of May 1, 1936, extending the Wheeler-Howard Act to Alaska. We were led to hold that Order 128, set out in full in note 1, *supra*, validity included in the reservation the waters to a distance of 3,000 feet from its shores. In his handling of the problems of the Karluk natives as affected by their need for a reservation and fishing rights, the Secretary of the Interior took another step under the authority of § 1 of another act, the White Act, 48 USCA § 222, 5 FCA title 48, § 222. The section is set out at length in the text beginning on page 969, of this opinion. The Act was for the protection of the fisheries of Alaska. Section 1 authorized the Secretary to set apart fishing areas in any of the waters of Alaska and establish in those preserves closed seasons "during which fishing may be limited or prohibited."

Pursuant to this statute detailed regulations were issued by the Secretary of Commerce and they have been continued by the Secretary of the Interior since Reorganization Plan No. II, note 4, *supra*.⁴³ One area established was the Kodiak Area which included the waters here in question.⁴⁴ Among the waters at first closed to commercial salmon fishing

⁴³Alaska Fisheries General Regulations, 50 CFR c II, p 2333.

⁴⁴*Id.* p 2355; 3 FR 393.

were the Karluk River spawning waters and those within 100 yards of its mouth.⁴⁵ Later the Secretary of Interior, still acting solely under § 1 of the White Act, added the waters of the Karluk Reservation to the prohibited areas.⁴⁶ An exception was made in the regulation to the prohibition against fishing in the reservation waters. The precise language of the entire subsection (r) of the regulation § 208.23, is on page 969, of this opinion. We repeat here the exception:

“The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat 1250, 48 USC 358a). Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative.”

The citation to 49 Stat 1250 c 254 is to the Act of May 1, 1936, authorizing the creation of the reservation. Perhaps it was thought that the creation of the reservation justified this exception in the White Act regulation but we do not understand that any support from that Act is claimed for the establishment of the White Act preserve.

The validity of the exception permitting fishing by natives in possession of the reservation and their

⁴⁵Id. p 2359.

⁴⁶11 Fed Reg 3105, 9528.

licensees is challenged by respondents because of a proviso in § 1 of the White Act, reading:

“Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. . . .”

Respondents alleged that the exception for fishing by natives and their licensees made § 208.23 (r) wholly illegal because it was inconsistent with the proviso of § 1 of the White Act as to exclusive or several right of fishery. The District and Circuit Courts agreed with this argument and the District Court said that the regulation must be viewed in its entirety, 67 F Supp 43, 49. We agree that it is not possible to separate the closing of the area from the exception and thus hold the closing applicable to everyone. A right to fish locally is too important to the natives in Alaska for us to conclude from this record that the Secretary would have promulgated the prohibition to fish for salmon in reservation waters without the exception in favor of the natives. We have no doubt, however, that the White Act authorizes the establishment of White Act preserves or closed areas in reservations created, as the Karluk Reservation, under § 2 of the Act extending the Wheeler-Howard Act to Alaska. No implications can be drawn from the broad and clear

language of the White Act that reservation waters, however valuable for fishing or fish propagation, must be left unprotected from ruthless exploitation.

What we have said heretofore in this opinion as to the importance of fisheries and their conservation to Alaska natives with reference to the Karluk River area in particular need not be repeated. The quoted section of the White Act gives power to the Secretary so that he may "(c) make such regulations as to time, means, methods and extent of fishing as he may deem advisable." Then follows the proviso that every such regulation shall be of general application and that no exclusive or several right of fishing shall be granted therein. This section was enacted to correct alleged abuses that arose in the administration of the Act "For the protection and regulation of the fisheries of Alaska," approved June 26, 1906, 34 Stat 478, c 3547. By § 6 of the earlier act, streams or lakes could be set aside as permanent preserves but not coastal waters. Although the 1906 Act did not delegate regulatory powers in the amplitude of the White Act, fishing reservations in territorial waters were created by Executive Order and regulations were issued thereunder.⁴⁷ The policy behind these regulations and

⁴⁷Executive Order of Feb. 17, 1922, creating the Alaska Peninsula Fisheries Reservation; Executive Order No. 3752 of Nov. 3, 1922, creating the Southwestern Alaska Fisheries Reservation. Regulations issued under these two Executive Orders are printed in the Fisheries Service Bulletin of the Bureau of Fisheries, Dept. of Commerce, No. 92, Jan. 2, 1923.

their administration was to restrict the right to fish commercially to those who had formerly fished in these areas. See Fisheries Service Bulletin No. 92, Jan. 2, 1923. Congress did not propose that these rich fishing grounds should be monopolized by this defined group. The legislative history of the White Act only emphasizes what the statute clearly says, that is, no special privileges in Alaskan fishing preserves.⁴⁸ The enforcement provisions of the White Act gave stern warning to prospective violators.⁴⁹

⁴⁸65 Cong Rec 5974; 65 Cong Rec 9520-21; 65 Cong Rec 9681 et seq.; HR Rep No 357, 68th Cong 1st Sess p 2; Sen Rep No 449, 68th Cong 1st Sess p 5; House Hearings, Committee on Merchant Marine & Fisheries, Fisheries of Alaska (1924), HR 2714, January 31-February 8, 1924, pp 21 et seq. Note that this is a different bill than HR 8143 which became the White Act but the subject was the same. See HR Rep No 357, supra, p 967. *Dow v. Ickes*, 74 App DC 319, 123 F2d 909.

⁴⁹43 Stat 466, c 272, 48 USCA § 226, 5 FCA title 48, § 226:

“Sec. 6. Any person, company, corporation, or association violating any provision of this Act or of said Act of Congress approved June 26, 1906, or of any regulation made under the authority of either, shall, upon conviction thereof, be punished by a fine not exceeding \$5,000 or imprisonment for a term of not more than ninety days in the county jail, or by both such fine and imprisonment; and in case of the violation of section 3 of said Act approved June 26, 1906, as amended, there may be imposed a further fine not exceeding \$250 for each day the obstruction

For the conservation of the fisheries, it was recognized that administrative flexibility must be permitted.

“The waters of Alaska are so vast and the local conditions so varied that it is utterly impossible to prescribe by legislation in detail the provisions necessary to meet each situation. To attempt to do so would be to defeat the purposes sought. This can be done by placing broad powers and a wide discretion in the administrative branch having charge of the subject.” Sen Rep No 449 on HR 8143 (which became the White Act), 68th Cong 1st Sess p 2. Compare *Dow v. Ickes*, 74 App DC 319, 123 F2d 909, 913.

therein declared unlawful is maintained. Every boat, seine, net, trap, and every other gear and appliance used or employed in violation of this Act or in violation of said Act approved June 26, 1906, and all fish taken therein or therewith, shall be forfeited to the United States, and shall be seized and sold under the direction of the court in which the forfeiture is declared, at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of as other fines and forfeitures under the laws relating to Alaska. Proceedings for such forfeiture shall be in rem under the rules of admiralty.

“That for the purposes of this Act all employees of the Bureau of Fisheries, designated by the Commissioner of Fisheries, shall be considered as peace officers and shall have the same powers of arrest of persons and seizure of property for any violation of this Act as have United States marshals or their deputies.”

Although § 8 of the White Act⁵⁰ left a power in the Territorial Legislature of Alaska to impose taxes or licenses for fishing, we do not read § 8 as limiting the power to license fishing to the Territorial Legislature. The section does not make the legislative power exclusive. Since § 1 of the White Act not only authorizes the establishment of fishing preserves but also requires that the fishing be carried on “in conformity with such rules and regulations as the Secretary prescribes under the authority herein given,”⁵¹ we are of the opinion that licenses for fishing may be required in areas regulated under the White Act. We think, however, these licenses may be only regulatory in character and, within the discretion of the Secretary, must have their cost fixed so as not to exceed the estimated approximate cost of reasonable policing of the area. We do not read the White Act as empowering the Secretary to raise general funds for native welfare or general conservation purposes from White Act preserves.

⁵⁰43 Stat 467, c 272; 48 USCA § 228, 5 FCA title 48, § 228.

“Sec. 8. Nothing in this Act contained, nor any powers herein conferred upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by the Act of Congress approved August 24, 1912, ‘To create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes.’ ”

⁵¹See § 1 of the White Act, p 969, *supra*.

As § 208.23 (r) with its exception in favor of the natives in possession of Karluk Reservation and their licensees is based upon § 1 of the White Act, we think it clear that its proviso "that no exclusive or several right of fishery shall be granted therein," applies to commercial fishing by natives equally with fishing companies, nonresidents of Alaska or other American citizens and so applies whether those natives are or are not residents on a reservation. We find nothing in the White Act that authorizes the Secretary of the Interior to grant reservation occupants the privilege of exclusive commercial fishing rights. It seems also clear to us that the adoption of a corporate charter and a constitution by the Native Village of Karluk under §§ 16 and 17 of the Wheeler-Howard Act, discussed at p 979, *supra*, can add nothing to the power of the Secretary under the White Act. "Exclusive," as used in § 1 of the White Act forbids not only a grant to a single person or corporation but to any special group or number of people. The legislative history set out above shows this. The offending regulations which brought about the enactment of the proviso in § 1 of the White Act were administered so as to limit fishing to those who had been using the fisheries before the regulations. The White Act fishing preserves were not intended to furnish a monopoly to a favored few. Whatever may be the powers of the Department of the Interior or the natives as to regulating the entrance of persons other than natives in possession of Karluk

Reservation into or on the area of land and water in that reservation,⁵² they are not broad enough to allow the use of the White Act sanctions to protect the reservation against trespass. White Act sanctions are for White Act violations. The Department of the Interior by § 208.23 (r) has decided upon the conservation of fisheries in the described waters of the Karluk Reservation in accordance with the White Act with an exception in favor of the natives that seems to rest on the fact that the natives are on a reservation that includes the White Act conservation area. This cannot be done. The welfare of the 57 electors of Karluk Reservation and their families is important. The Secretary of the Interior, however, cannot give them such preferences as are here given under the authority of the White Act. Other American citizens are equally entitled to the benefits from White Act preserves.⁵³ We hold that

⁵²[March 3, 1893] See 27 Stat 612, 631, c 209, relating to representation of Indians by the United States district attorneys; Cohen, Handbook of Federal Indian Law, pp 252, 253; Powers of Indian Tribes, Solicitor of the Interior, Nathan R. Margold, October 25, 1934, M27781 pp 55-58. See *United States v. Candelaria*, 271 US 432, 70 L ed 1023, 46 S Ct 561; *United States v. Berrigan*, 2 Alaska 442; *United States v. Cadzow*, 5 Alaska 125.

⁵³*Dow v. Ickes*, 74 App DC 319, 123 F2d 909, 916: "It prohibits monopoly, but it does not prohibit reasonable discriminations required by the purpose of conservation and limitations inherent in the type of fishing to which the Secretary's judgment must be applied."

the regulation § 208.23 (r) is void as a whole because it violates the proviso of the White Act. See p 969.

IV.

There are problems connected with the administration of the Karluk Reservation and the protection of the fishing preserves that have not been determined by the courts or the Department of the Interior. Our holding that coastal waters may be included in the reservation waters and that the White Act cannot be used to create a monopoly in the Indians establishes a different basis for administrative and judicial conclusions. The 1945 ordinance must be considered; it appears in the margin.⁵⁴ It states that Public Land Order 128 restricts the right to fish commercially in the reservation waters to Karluk inhabitants. This ordinance

⁵⁴“An Ordinance. Whereas, under Public Land Order 128, of May 22, 1943, creating the Karluk Reservation, the right to fish commercially in the waters of said reservation is restricted to the inhabitants of the Native Village of Karluk and vicinity, and;

“Whereas, nonresidents desire to continue their fishing operations in the waters of said reservation;

“Now, Therefore, be it ordained by the Council of the Native Village of Karluk, a Federal corporation chartered under the Act of June 18, 1934, as amended;

“Section 1. That it shall be unlawful for any person, partnership, firm, association or corporation, to fish for, take or catch any fish, or to operate any fishing vessel, gear or equipment, within the waters of the Karluk Reservation except under a permit issued by the Native Village of Karluk, for which

antedates the regulation. See p 968, *supra*. It evidently is based on the theory that the creation of the reservation gave exclusive fishing rights to the natives in possession. Permits required the approval of the Secretary of the Interior or his authorized representative.⁵⁵ An example of the permit is

the fee shall be as follows:

“(A) For residents of the Territory of Alaska \$1.00

“(B) For non-residents of the Territory of Alaska \$25.00

“Provided further, that a person to qualify for a resident (Class A) permit must have resided in the Territory of Alaska for three consecutive years prior to the date of their application, or request, for a permit.

“Section 2. The possession of fish upon any vessel within said waters without a permit shall constitute *prima facie* evidence of a violation of this ordinance.

“Section 3. Any violation of this ordinance shall be punished by a fine of not exceeding Five Hundred Dollars (\$500).

* * *

“Approved this 31st day of May, 1945.”

The 1946 ordinance made the fee \$2.00 for residents of Alaska and \$40.00 for nonresidents.

Karluk had received its corporate charter, constitution and by-laws August 23, 1939. Official publications, Office of Indian Affairs, Department of the Interior. See §§ 16 and 17, 48 Stat 987, c 576, 25 USCA §§ 476, 477, 5 FCA title 25, §§ 476, 477.

⁵⁵Section 5 of the Corporate Charter of the Native Village of Karluk provides that “In using its powers the corporation must not do the following things:

* * *

“Make leases, permits or contracts covering any

printed below.⁵⁶ We know nothing from the record of the reasons for the \$2 fee for residents or the \$40 fee for nonresidents or their relation to the cost of policing the area. See *Haavik v. Alaska Packers' Asso.* 263 US 510, 68 L ed 414, 44 S Ct

lands or waters set aside as a reserve for the Village without the approval of the Secretary of the Interior or his authorized representative.”

56

“Commercial Fishing Permit

“Karluk Indian Reservation, Karluk, Alaska, June 30, 1946.

“Pursuant to an Ordinance passed by the Council of the Native Village of Karluk, Alaska, dated May 31, 1946, permission is hereby given by the Native Village of Karluk to Ray Harmon of Kodiak, Alaska, to enter the waters and land of the Karluk Reservation for the purpose of engaging in commercial fishing for salmon, S. J. F & P Co., during the period:

June 1946 to September 1946.

“This permit is issued subject to the conditions printed on the back hereof.

EWAN M. NAUMOFF,

Issuing Officer.

PRESIDENT KARLUK,

Title.

I accept:

RAY HARMON,

Permittee.

Approved:

H. C. BINGHAM,

Approving Officer.

Boat No. or Name: Caroline

Fishing for: San Juan Uganik Bay, Alaska

Asst. Teacher A.N.S.

(Cannery)

Name

Address

Title

“Conditions

“This permit is valid only if approved by the

177. So far as appears after once approving an ordinance, the Department's only direct control over the ordinance is by approval or disapproval of amendments.⁵⁷

This is an equitable proceeding in which the respondents seek protection against unlawful action by petitioner, the Regional Director of the Fish and Wildlife Service of the Department of the Interior. The interests of respondents, the Indians of Karluk Reservation, and the efforts of the Depart-

General Superintendent of the Indian Service in Alaska or his duly authorized representative, and is revocable in the discretion of the issuing officer. It is not transferable and must be carried on the person of the permittee when engaged in fishing authorized hereunder, and must be exhibited to any person requesting to see it. This permit is issued and accepted by the permittee on the express condition that the permittee will comply with all the provisions of law and regulations governing fishing on the Karluk Indian Reservation, Alaska. The permittee is warned not to interfere with the fishing activities of the Indians of the Karluk Indian Reservation nor use, disturb, or destroy any property belonging to said Indians."

⁵⁷Article 6 of the Constitution of the Native Village of Karluk provides that "Changes in this Constitution and By-laws may be made if the changes are approved by the Secretary of the Interior and by a majority vote of the Village members voting in an election called by the Secretary of the Interior at which at least 30 per cent of the voting membership take part."

ment of the Interior to administer its responsibilities fairly to fishermen and Indians are involved.⁵⁸ These are questions of public policy which equity is alert to protect.⁵⁹ This Court is far removed from the locality and cannot have the understanding of the practical difficulties involved in the conflicts of interest that is possessed by the District Court. Therefore we think it appropriate for us to refrain from now entering a final order disposing definitively of the controversy. With our conclusion on the law as to the establishment of the reservation and the invalidity of the regulation before them, the Department and the parties should have a reasonable time, subject to the action of the District Court on the new proposals, to adjust their affairs so as to comply with our determinations.

We therefore vacate the decrees of the District Court and the Court of Appeals and remand this proceeding to the District Court with directions to allow thirty days from the issuance of our mandate for the Secretary of the Interior to give considera-

⁵⁸For a discussion of the difficulties of the preparation of regulations, compare *Addison v. Holly Hill Fruit Products*, 322 US 607, 88 L ed 1488, 64 S Ct 1215, 153 ALR 1007. See also the statements of the Commissioner of Indian Affairs in Hearings before the House Committee on Indian Affairs, 73d Cong 2d Sess on HR 7902 (Wheeler-Howard Act).

⁵⁹*Virginian R. Co. v. System Federation*, R. E. D. 300 US 515, 552, 81 L ed 789, 802, 57 S Ct 592; *Harrisonville v. W. S. Dickey Clay Mfg. Co.* 289 US 334, 338, note 2, 77 L ed 1208, 1211, 53 S Ct 602.

tion to the effect of our decision. Unless steps are taken in this proceeding the District Court, on the expiration of thirty days, shall enter a decree enjoining the defendant Hynes and all acting in concert with him substantially as ordered in the permanent injunction entered November 6, 1946.⁶⁰ If timely steps are taken, the District Court will, of course, be free to enter such orders as it may deem proper and not inconsistent with the present decision. Pending the entry of further orders by the District Court, the preliminary injunction entered July 18, 1946, shall apply to protect the rights of the respondents.

It is so ordered.

Mr. Justice Rutledge, with whom Mr. Justice Black and Mr. Justice Murphy agree, dissenting in part.

I.

Jurisdictional questions aside, I am in full agreement with the Court's conclusion that Public Land Order 128, 8 Fed Reg 8557,¹ is valid and was effective, according to its terms, to include in the reservation for the Karluk Indians the tidelands and coastal waters therein described. This action was

⁶⁰Compare *Atlantic Coast Line R. Co. v. Florida*, 295 US 301, 314, 315, 79 L ed 1451, 1460, 1461, 55 S Ct 713; *Burford v. Sun Oil Co.* 319 US 315, 333, 87 L ed 1424, 1434, 63 S Ct 1098; *Addison v. Holly Hill Fruit Products*, 322 US 607, 620, 88 L ed 1488, 1497, 64 S Ct 1215, 153 ALR 1007.

¹Set forth at note 1 of the Court's opinion.

taken pursuant to the statutory authorizations recited in the order and particularly the Act of May 1, 1936, 49 Stat 1250, c 254, 48 USCA § 358a, 5 FCA title 48, § 358a. When approved by the Indians in accordance with the proviso of the latter Act, Order 128 withdrew the area covered from any general or public right of access for fishing or other purposes inconsistent with those of the reservation and set aside that area for the exclusive benefit of the Indian occupants and inhabitants. Cf. *Alaska Pacific Fisheries v. United States*, 248 US 78, 63 L ed 138, 39 S Ct 40. The necessary effect was to forbid others to enter the area for purposes inconsistent with the reservation's objects, thus making persons so entering trespassers and subject to such remedies as the law may afford to prevent or redress their wrongful entry.

By his 1946 amendments to the Alaska Fisheries General Regulations, 50 CFR 1946 Supp § 208.23 (r), the Secretary of the Interior reinforced his prior action in setting aside the Karluk Reservation, prohibiting fishing within the coastal waters included in Public Land Order 128, except "by natives in possession of said reservation" and "by other persons under authority granted by said natives . . . by or pursuant to ordinance of the Native Village of Karluk" approved by the Secretary or his duly authorized representative.² This action was taken pursuant to 34 Stat 264, c 3299, 48 USCA § 244, 5

²See text of the amended regulation as quoted in the Court's opinion at p 957.

FCA title 48, § 244; 34 Stat 478, c 3547, 48 USCA § 230, 5 FCA title 48, § 230, as amended by the White Act of June 6, 1924, 43 Stat 464, c 272, as amended June 18, 1926, 44 Stat 752, c 621, 48 USCA § 221, 5 FCA title 48, § 221.

That Act, in the interest of “protecting and conserving the fisheries of the United States in all waters of Alaska,” conferred upon the Secretary of Commerce (now Interior), broad powers to “set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction” and within such areas to “establish closed seasons during which fishing may be limited or prohibited as he may prescribe.” See *Dow v. Ickes*, 74 App DC 319, 123 F2d 909. Effective penal provisions by way of criminal sanctions and for seizure and forfeiture of offending boats, gear and appliances were enacted to prevent or redress violation of the regulations made pursuant to the statute’s authorization.³

The promulgation of Amended Regulations § 208.23 (r), pursuant to the White Act’s provisions, reinforced the effect of Public Land Order 128 in withdrawing the area covered by the latter from public or common right of entry for fishing and other purposes. But it had also the further effect of notifying the public that trespass upon the reserved

³Reference is made to the Court’s opinion at p 957, for the pertinent language of the statute and at note 49 for the Act’s penal provisions.

area by persons not entitled to enter and use it would be met with the White Act sanctions⁴ for enforcement of the order and the amended regulations.

Although holding Public Land Order 128 valid and effective to establish the reservation for the Indians' exclusive benefit, the Court finds Amended Regulations § 208.23 (r) "void as a whole." The chief consequence held to follow is that the White Act sanctions cannot be applied to enforce the regulations or to prevent or redress trespass upon the reservation by others than the Indians in possession or their licensees.

With this conclusion I cannot agree. The amended regulations' invalidity is said to follow solely because of the exception permitting natives and their licensees to fish in reservation waters. This is said to violate the White Act proviso, which forbids any "exclusive or several right of fishery" and denial to any citizen of the right to fish in any waters where fishing is permitted by the Secretary's regulations. In other words, because the Secretary allows the Indians to fish in the reservation waters he must allow all others to do so on equal terms, otherwise his regulations become totally void and the White Act sanctions unavailable for protection of the reservations and the Indians' rights.

This view, it seems to me, rests upon two fallacies. One is that the two statutes, of 1936 and 1924, are in irreconcilable collision and the Secretary cannot

⁴See note 49, majority opinion.

exercise the powers given to him by the 1936 Act and by the White Act consistently and simultaneously with reference to the same waters. The other fallacy is a corollary, namely, that the White Act proviso applies wherever the White Act prohibitions and sanctions may be made applicable, even though the area is a valid Indian reservation.

I do not think the two statutes are in such inescapable inconsistency as forbids their simultaneous and harmonious application in setting aside and protecting reservations for the exclusive use and benefit of the native Indian population. Indeed their legislative history and purposes demonstrate that they were intended to serve common objects in the conservation and protection of Alaskan fisheries.

The White Act was adopted in 1924. Its primary object was to preserve the fisheries of Alaska from the destructive private exploitation then taking place. That evil did not arise from any previous, existing, or anticipated policy of setting aside reservations for the exclusive benefit of the natives. It arose exclusively from quite the contrary policy of permitting widespread commercial exploitation by specially favored groups, not of Indians but of others who sought and secured monopolistic privileges and favors in fishing. There were therefore twin evils at which the White Act struck. One was the rapid and virtually unrestrained depletion and destruction of the fisheries; the other, the expanding creation of commercial monopolies fostered by pre-existing policy in regulating the industry. 65 Cong

Rec 9520-9521; see also 65 Cong Rec 9680-9682; HR Rep No 357, 68th Cong 1st Sess 2; Sen Rep No 449, 68th Cong 1st Sess 5; Hearings before Committee on Merchant Marine and Fisheries on HR 2714, 68th Cong 1st Sess.

The White Act, accordingly, was not merely and exclusively an antimonopoly statute. It was both a conservation measure and one to outlaw private, commercial monopoly. The conservation features were contained in the basic general provisions giving the Secretary his broad powers of control over fishing. The more specific antimonopoly features were included in the proviso. The latter were important. But they did not override or minimize the more general provisions, apart from the proviso giving the Secretary power to regulate the industry in the interest of "protecting and conserving the fisheries of the United States in all waters of Alaska." The proviso merely limited the manner in which his power was to be exercised in the situations to which the proviso was applicable.

So the questions arise whether the proviso was intended to have any effect in waters validly set aside by Congress, executive order, or the Secretary as reservations for the exclusive benefit of the native population and, correlatively, whether the policy of the proviso was meant to forbid the application of other provisions of the White Act, including its prohibitions and sanctions, in the protection and conservation of such reservations. In other words, was the general policy of the White Act in conflict

with the policy existing at its enactment concerning Alaskan Indian reservations or later under the 1936 Act, so as to require that the two policies or statutes be kept entirely separate and distinct in their application and administration and to forbid them to be applied conjointly in executing their common conserving and protecting objects.

Certainly the White Act proviso had no purpose to throw open validly created Indian reservations to fishing by all comers. Its aim was not to destroy such reservations or to open them to general, common rights of fishing. In view of the legislative history cited above, which is consistently supported by subsequent administrative construction,⁵ the proviso cannot be construed as expressing any policy hostile to creating such reservations with exclusive rights of fishing for the native population and protecting them against wrongful invasion. On the contrary, the statute, including the proviso, was strongly supported by the delegates in Congress from Alaska and others representing the native interests⁶ as against those of commercial exploitation toward which the Act was aimed. There were numerous Indian reservations in existence at the time

⁵See, e.g., Department of Commerce, Laws and Regulations for Protection of Fisheries of Alaska (Dept Circular No. 251, 13th ed), Dec. 22, 1926; Op of Solicitor, Dept. of Interior, 56 ID 110.

⁶See the legislative debates, reports and hearings cited in the text, *supra*.

of the legislation cf. *Alaska Pacific Fisheries v. United States*, 248 US 78, 63 L ed 138, 39 S Ct 40, *supra*, affording the natives exclusive fishing rights. But the extensive legislative history discloses no protest, complaint or concern arising on account of them. Indeed it gives strong reason for believing that the native interests joined with others in opposing continuance of the policy of monopolistic commercial exploitation and in support of the White Act, including the proviso, as a necessary method of preventing the imminent destruction of the natives' historic means of livelihood by that form of exploitation, and not at all by reason of any evils arising out of exclusive fishing rights granted to the native population in reservations validly created for its benefit.

Consequently, far from representing an attitude or purpose of hostility toward a policy of Indian reservations with exclusive native rights of fishing, the White Act constituted an effective step toward conserving the Alaskan fisheries, under the Secretary's broad regulatory powers, for such purposes as well as for the prevention of monopoly in open fishing areas where no reservations existed.

It follows, in my view, that the White Act proviso has, and was intended to have, no application to validly created Indian reservations, either to forbid the Secretary to exclude others than natives from fishing in the reservation waters or to compel him, if he allows the natives to fish, to permit all other citizens to do so on equal terms. The proviso had

no purpose so to restrict his powers in relation to reservation areas. It was directed solely against abuses by other than native interests in waters not included within areas set aside for the natives' exclusive benefit.

But it does not follow, in my opinion, that because the proviso is inapplicable the Secretary is forbidden to exercise his regulatory and enforcing powers under the White Act in protection of reservations and the natives' exclusive rights in them or that he cannot utilize those powers and the White Act sanctions conjointly with his authority under the 1936 Act to create reservations and protect them against unlawful invasion. The White Act proviso aside as inapplicable in purpose and intent to the specific situation, i.e., one involving a validly created reservation, nothing in either statute forbids his doing so. Each is in terms a conservation measure, having the common object of preserving and protecting the Alaskan fisheries from unrestricted exploitation and destruction by commercial interests. That community of purpose is not affected by the fact that the one Act secures this protection for the public generally, the other for the special benefit of the native population. That difference merely means that two interests require and are given protection against a third, not that the latter acquires immunity against protection afforded either or both of the other two.

Accordingly, in my opinion, the White Act proviso being inapplicable to waters included in a valid

Indian reservation, the two statutes may be applied to serve their basic common objects of conserving and protecting fisheries in all Alaskan waters, including those set apart as valid Indian reservations, as against the private, commercial exploitation and monopoly which the White Act and the Act of 1936 were intended to prevent. The statutes should be construed and Congress, I think, intended them to be construed, so as to work together harmoniously, not irreconcilably, to achieve this object.

I therefore cannot regard Amended Regulations § 208.23 (r) as "void as a whole." The regulations are valid, in my judgment, and enforceable by application of the White Act sanctions, except possibly in one respect. This is the feature by which the Secretary has delegated to the Village of Karluk the authority by ordinance to license others than natives of the village to fish on terms fixed by the ordinance subject to the Secretary's approval. Conceivably that power might be exercised by the village, through licensing others than native inhabitants, in a manner which would violate the spirit of the White Act proviso, i.e., by licensing favored commercial interests so as to create essentially the type or types of monopoly or favoritism the proviso intended to forbid.

It is one thing of course for the Secretary to give the natives exclusive rights of fishing in the reservation's waters. It may be entirely another for him to delegate to them the licensing of others, even retaining the power to approve the licensing ordi-

nance as Amended Regulations § 208.23 (r) does.

II.

Whether or not the authority conferred by the regulations upon the village to license others is valid is a question, however, which I think it neither necessary nor appropriate to answer in this proceeding, for reasons affecting the existence and propriety of exercising equity jurisdiction in this cause, now to be stated.

I seriously doubt the existence of equity jurisdiction on the showing made by this record. But in any event I do not think it should be exercised to afford respondents the relief they have sought. The Secretary of the Interior, whose regulations and authority are at stake, has not been made a party to the suit. Nor has the Village of Karluk, which obviously is vitally interested. Moreover, the allegations concerning threatened enforcement of the regulations by White Act sanctions seem questionably sufficient to establish the basis for equitable intervention, in view of circumstances appearing in the record and asserted in briefs filed here questioning their sufficiency.

But, if all these factors are put to one side, one other remains which in my opinion precludes granting the equitable relief respondents seek. Their claim was founded in the complaint, as I think it had to be, not only upon the alleged invalidity of Amended Regulations § 208.23 (r), but also upon the asserted invalidity of Public Land Order 128.

However, they have not been successful in the latter attack, for the Court holds that Public Land Order 128 is valid and was effective to create the Karluk Reservation according to that order's terms.

This ruling cuts all valid ground from beneath respondent's claim to aid from a court of equity. With it, they come not as persons entitled of right to enter the reservation and fish, but solely as trespassers having no right of entry, but seeking only to avert the incidence of possible remedies for threatened wrongful entry. In effect the Court's decision is that respondents, although they have not put forward their case in this light, are entitled to have it so determined and to have equitable relief which prevents possible application of White Act sanctions against them. I cannot agree that persons so situated have standing to invoke the assistance of a court of equity. Accordingly I think the judgment should be reversed and the cause should be remanded with instructions to dismiss it.

Mr. Justice Douglas joins in Part I of this opinion.

Adv. Ops. Oct. Term, 1948

Supreme Court of the United States

No. 24, October Term, 1948

FRANK HYNES, Regional Director, Fish and
Wildlife Service, Department of Interior,

vs.

GRIMES PACKING CO., et al.

MANDATE

United States of America—ss.

The President of the United States of America,

To the Honorable the Judges of the United States
District Court for the Territory of Alaska

Greeting:

Whereas, lately in the United States Court of Appeals for the Ninth Circuit, in a cause between Frank Hynes, Regional Director, Fish and Wildlife Service, Department of Interior, Appellant, and Grimes Packing Co., et al., Appellees, wherein the decree of the said Court of Appeals, entered in said cause on the 21st day of November, A.D. 1947, is in the following words, viz:

“This cause came on to be heard on the Transcript of the Record from the District Court for the Territory of Alaska, Fourth Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree

of the said District Court in this cause be, and hereby is affirmed.”

as by the inspection of the transcript of the record of the said United States Court of Appeals which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and forty-eight, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the District Court for the Territory of Alaska and the decree of the said Court of Appeals, in this cause, be, and the same are hereby, vacated.

And it is further ordered, That this cause be, and the same is hereby, remanded to the District Court for the Territory of Alaska with directions and for proceedings in conformity with the opinion of this Court.

May 31, 1949.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable Fred M. Vinson, Chief

Justice of the United States, the first day of July,
in the year of our Lord one thousand nine hundred
and forty-nine.

/s/ CHARLES EDWARD

CROFFEY,

Clerk of the Supreme Court
of the United States.

[Seal of Supreme Court.]

[Lodged]: July 15, 1949.

[Endorsed]: Filed and entered July 20, 1949,
U.S.D.C.

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 5505

GRIMES PACKING CO., KADIAK FISH-
ERIES COMPANY, LIBBY McNEILL AND
LIBBY, FRANK McGONAGHY & CO., INC.,
PARKS CANNING CO., INC., SAN JUAN
FISHING & PACKING CO., and UGANIK
FISHERIES, INC.,

Plaintiffs,

vs.

FRANK HYNES, REGIONAL DIRECTOR,
FISH AND WILDLIFE SERVICE, DE-
PARTMENT OF INTERIOR,

Defendant.

MOTION FOR ORDER OF DISMISSAL

Comes now the above named defendant, represented by Harry O. Arend, United States Attorney for the Fourth Judicial Division of Alaska, and Everett W. Hepp, Assistant United States Attorney for said Division, and moves the Court for an order finally dissolving the temporary and permanent injunctions heretofore issued herein and dismissing the above-entitled action for the reason that the restrictive provisions contained in paragraph 208.23 (r) of the 1946 Alaska Fisheries General Regulations issued by the Department of Interior of the United States, against the enforcement

of which this honorable court granted injunctive relief herein to the above-named plaintiff, have since been deleted from said regulations by order of the Assistant Secretary of said Department of Interior. This Motion is based upon the records and files herein and upon the Affidavit of Harry O. Arend, hereto attached.

Dated at Fairbanks, Alaska, this 20th day of July, 1949.

/s/ HARRY O. AREND,

United States Attorney,

/s/ EVERETT W. HEPP,

Assistant U. S. Attorney.

Affidavit of Harry O. Arend

United States of America,
Territory of Alaska—ss.

Harry O. Arend, being first duly sworn, on oath deposes and says:

He is the United States Attorney for the Fourth Judicial Division, Territory of Alaska, and represents the above-named defendant in this action under direction of the Attorney General of the United States of America.

This cause came on for hearing in equity before the Honorable Harry E. Pratt, Judge, of the above entitled Court on the 29th day of October, 1946; and thereafter, on the 6th day of November, 1946, the Court signed and ordered entered its decree that a

permanent injunction be granted enjoining the defendant, Frank Hynes, Regional Director of the Fish and Wild Life Service, Department of Interior, his agents, servants, employees, attorneys, and all other persons in active concert and participation with him from enforcing or attempting to enforce the restrictive provisions of Section 208.23 (r) of the 1946 Alaska Fisheries General Regulations (50 C.F.R. 1946 Supp.; 11 F.R. 3105) and from seizing any boats, seines, nets or other gear and appliances used or employed in fishing by the above-named plaintiffs in the waters in and adjacent to the Karluk Indian Reservation situate on Kodiak Island, Alaska, three thousand feet seaward from the shore at mean low tide or any fish taken therewith, or from arresting any of plaintiffs' fishermen who carry on fishing operations in said waters.

Said defendant then appealed to the United States Court of Appeals for the Ninth Circuit from the above-mentioned judgment granting said permanent injunction; and, on the 21st day of November, 1947, said Court of Appeals entered its decree in said cause, affirming the judgment of the above-entitled District Court, whereupon the defendant perfected his appeal of said cause to the Supreme Court of the United States.

On the 31st day of May, 1949, said Supreme Court rendered its opinion in said cause (69 Supreme Court Reporter 968), the final paragraph whereof recites:

“We therefore vacate the decrees of the District

Court and the Court of Appeals and remand this proceeding to the District Court with directions to allow thirty days from the issuance of our mandate for the Secretary of the Interior to give consideration to the effect of our decision. Unless steps are taken in this proceeding the District Court, on the expiration of thirty days shall enter a decree enjoining the defendant Hynes and all acting in concert with him substantially as ordered in the permanent injunction entered November 6, 1946. If timely steps are taken, the District Court will, of course, be free to enter such orders as it may deem proper and not inconsistent with the present decision. Pending the entry of further orders by the District Court, the preliminary injunction entered July 18, 1946, shall apply to protect the rights of the respondents."

On the 1st day of July, 1949, said Supreme Court issued its Mandate to the above-entitled District Court, setting forth its judgment and decree that the earlier decrees of said District Court and said Court of Appeals be vacated and that the cause be remanded to said District Court with directions and for proceedings in conformity with said opinion of the Supreme Court, and commanding said District Court to have such proceedings in this cause as shall be in conformity with the opinion of said Supreme Court; and that said mandate has been ordered by said District Court to be filed and spread in its minutes.

Subsequent to the rendition of said opinion of the Supreme Court of the United States, to wit, on the

13th day of June, 1949, the Assistant Secretary of the Department of Interior of the United States, by virtue of the authority contained in the Act of June 6, 1924, as amended (48 U.S.C. Sec. 221, et seq), an Act for the protection of the fisheries of Alaska, known as the White Act, and by virtue of the decision of the United States Supreme Court in this cause, as above set forth, ordered said section 208.23 (r) of the 1946 Alaska Fisheries General Regulations, which has been redesignated as paragraph (r) of Section 108.24 of the current regulations (13 F.R. 8695) to be amended by deleting said paragraph (r). Said amendment by deletion is set forth in the Federal Register of June 17, 1949; wherefore the plaintiffs are no longer in need of the equitable relief sought in this cause.

/s/ HARRY O. AREND.

Subscribed and sworn to before me this 20th day of July, 1949.

[Seal] /s/ JEAN COX,
Notary Public in and
for Alaska.

My commission expires: 12-20-52.

[Endorsed]: Filed July 20, 1949.

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

This is to certify that the undersigned attorneys for all of the above-named plaintiffs have been duly and regularly served by mail, as required by Rule 5(b) of the Federal Rules of Civil Procedure, with "Motion for Order of Dismissal" in the above-entitled cause on the 25th day of July, 1949, at Seattle, Washington.

/s/ W. C. ARNOLD,

/s/ EDWARD F. MEDLEY,

Attorneys for all of the above-named plaintiffs.

[Endorsed]: Filed Aug. 16, 1949.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON THE MANDATE

Come now the above-named plaintiffs acting by their attorneys of record, W. C. Arnold and Edward F. Medley, both of Seattle, Washington, appearing in person, and move the court for the entry of a decree enjoining the defendant Hynes and all acting in concert with him in accordance with the terms of the permanent injunction entered herein on November 6, 1946.

This motion is based upon the records and files in

the above-entitled case and upon the judgment of the Supreme Court of the United States rendered on May 31, 1949, in the case of Frank Hynes, Regional Director, Fish and Wildlife Service, Department of the Interior, Petitioner, v. Grimes Packing Co., Kadiak Fisheries Company, Libby McNeill & Libby, et al., which was decided on a writ of certiorari issued to the above-named defendant as petitioner against the above-named plaintiffs in the above-entitled action, and upon the mandate of the Supreme Court of the United States in said matter issued on July 1, 1949, which has heretofore been spread upon the records of this court in the above-entitled action.

Dated at Fairbanks, Alaska, this 19th day of September, 1949.

MEDLEY & HAUGLAND,
By /s/ EDWARD F. MEDLEY,
/s/ W. C. ARNOLD,
Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 19, 1949.

[Title of District Court and Cause.]

ORDER

The Plaintiffs were represented by Edward Medley and W. C. Arnold; the defendant by Harry O.

Arend, U. S. Attorney. Respective counsel had argument on the defendant's Motion to dismiss and the Plaintiff's Motion for Judgment on the Mandate from the Supreme Court of the United States.

On the oral stipulation of respective counsel, and on the Motion of Mr. Arend that the defendant be permitted to amend his Motion for Order of Dismissal by Interlineation in the fourth line of the Motion, it was Ordered that the Motion be granted, said interlineation to be done forthwith by the Clerk.

It was Ordered that the Motion for an Order of Dismissal be denied and the Motion for Judgment on the Mandate be granted.

Entered Sept. 19, 1949.

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 5505

GRIMES PACKING CO., KADIAK FISH-
ERIES COMPANY, LIBBY, McNEILL AND
LIBBY, FRANK McCONAGHY & CO., INC.,
PARKS CANNING CO., INC., SAN JUAN
FISHING & PACKING CO., and UGANIK
FISHERIES, INC.,

Plaintiffs,

vs.

FRANK HYNES, Regional Director, Fish and
Wildlife Service, Department of Interior,

Defendant.

JUDGMENT ON THE MANDATE

This matter coming on regularly for hearing before the court on the 19th day of September, 1949, on the motion of the above-named plaintiffs for judgment on the mandate of the Supreme Court of the United States in the above-entitled action issued on July 1, 1949, in accordance with the decision of the Supreme Court of the United States on a writ of certiorari rendered on May 31, 1949, W. C. Arnold and Edward F. Medley appearing for and on behalf of the above-named plaintiffs and defendant being represented by Harry O. Arend, United States Attorney for the Fourth Judicial Division of Alaska, and by Everett W. Hepp, Assist-

ant United States Attorney for said division, and it appearing to the court that the said mandate of the Supreme Court of the United States remanded the proceedings to this court with directions to allow thirty days from the issuance of the mandate for the Secretary of the Interior to give consideration to the effect of the Supreme Court decision. Said decision further provided that unless steps were taken in this proceeding that this court should, on the expiration of thirty days after the issuance of the mandate, enter a decree enjoining the defendant Hynes and all acting in concert with him substantially as ordered in the permanent injunction entered in this court on November 6, 1946. Said decision of the Supreme Court further provided that if timely steps were taken this court would be free to enter such orders as it might deem proper and not inconsistent with the opinion of the Supreme Court.

And it further appearing that no steps were taken in this proceeding in accordance with the decision of the Supreme Court and the mandate entered thereon and that the only action taken by the defendant above named was to file a motion for an order of dismissal, which said motion has heretofore on this date been denied;

Now, Therefore, by virtue of the law and the premises,

It Is Hereby Ordered that a permanent injunction be and the same is hereby granted enjoining the defendant Frank Hynes, Regional Director of

the Fish and Wildlife Service, Department of the Interior, his agents, servants, employees, attorneys, and all other persons in active concert and participation with him from enforcing or attempting to enforce, or seizing any boats, seines, nets, or other gear and appliance used or employed in fishing by the plaintiffs in the waters in and adjacent to the Karluk Indian Reservation situated on Kodiak Island, Alaska, three thousand feet seaward from the shore at mean low tide or any fish taken therewith, or from arresting any of plaintiffs' fishermen who carry on fishing operations in said water, by way of enforcing the restrictive provisions of Section 208.23(r) of the 1946 Alaska Fisheries General Regulations or any other regulations of like or substantially like import which may hereafter be promulgated or attempted to be promulgated by the Department of the Interior of the United States of America through its Fish and Wildlife Service or otherwise.

Done in open court at Fairbanks, Alaska, this 19th day of September, 1949.

/s/ HARRY E. PRATT,
District Judge.

Entered Sept. 19, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 19, 1949.

[Title of District Court and Cause.]

RETURN OF UNITED STATES MARSHAL ON
SERVICE OF JUDGMENT ON MANDATE

United States of America,
Territory of Alaska—ss.

I hereby certify that on September 26, 1949, I received a certified copy of the Judgment on the Mandate in the above-entitled cause which was entered by the District Court for the Fourth Judicial Division at Fairbanks, Alaska, on September 19, 1949, and that the certified copy was certified by John B. Hall, Clerk of the District Court for the Fourth Judicial Division; that I served the certified copy on the defendant, Frank Hynes, Regional Director, Fish and Wildlife Service, Department of the Interior, at Juneau, Alaska, on October 5, 1949.

Dated at Juneau, Alaska, September 5, 1949.

United States Marshal, Territory of Alaska, First
Judicial Division

By /s/ WALTER G. HELLAN,
Office of Deputy.

[Endorsed]: Filed Oct. 15, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given this 17th day of November, 1949, that the defendant, Frank Hynes, Regional Director, Fish and Wildlife Service, Department of Interior, hereby appeals to the United States Court of Appeals for the 9th Circuit from the judgment of this Court entered on the 19th day of September, 1949, in favor of Grimes Packing Co., et al., against the said Frank Hynes.

Dated at Fairbanks, Alaska, this 17th day of November, 1949.

/s/ EVERETT W. HEPP,
United States Attorney.

[Endorsed]: Filed Nov. 17, 1949.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

I, Myrtle R. Clare, being first duly sworn, on oath depose and state:

That I have this day caused to be mailed to Medley and Haughland, attorneys for all the plaintiffs above named, a certified, true and correct copy

of the Notice of Appeal filed in the above-named Court on the 17th day of November, 1949.

/s/ MYRTLE R. CLARE.

Subscribed and sworn to before me this 17th day of November, 1949.

[Seal] /s/ JEAN COX,
Notary Public in and
for Alaska.

My commission expires: 12-20-52.

[Endorsed]: Filed Nov. 17, 1949.

[Title of District Court and Cause.]

**MOTION FOR AN ORDER EXTENDING
TIME TO DESIGNATE THE RECORD**

Comes now Everett W. Hepp, the United States Attorney for the Fourth Judicial Division, Territory of Alaska, and moves this Honorable Court for an order extending the time within which to file a designation of the record in the above-entitled case to February 15, 1950, such date being within 90 days of the date on which notice of appeal from the judgment in the above-entitled case was filed with this Honorable Court on November 17, 1949, and states as reason therefor;

That the United States Department of Justice has, through its representatives, caused an application

for a writ to be made to the United States Supreme Court and desires to learn that Honorable Court's findings thereon, if possible, before continuing to perfect the appeal filed herein.

/s/ EVERETT W. HEPP,
United States Attorney.

[Endorsed]: Filed Dec. 6, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO
DESIGNATE THE RECORD

This matter coming on regularly for hearing this 6th day of December, 1949, upon the motion of Everett W. Hepp, United States Attorney for the Fourth Judicial Division, Territory of Alaska, for an order extending the time within which to file the designation of the record in the appeal from the judgment in the above-entitled cause, and it appearing to the Court that good cause has been shown therefor;

It Is Ordered that the time is extended within which to file a designation of the record in the appeal for which notice was filed the 17th day of November, 1949, from forty days to ninety days.

Dated at Fairbanks, Alaska, this 6th day of December, 1949.

/s/ HARRY E. PRATT,
District Judge.

Entered Dec. 6, 1949.

[Endorsed]: Filed Dec. 6, 1949.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

I, Myrtle R. Clare, being first duly sworn, on oath depose and say:

That I am a Clerk employed in the office of the United States Attorney for the Fourth Division, Territory of Alaska;

That I have this 6th day of December, 1949, mailed to Medley & Haugland, attorneys at law, Seattle 4, Washington, a certified true and correct copy of the Order Extending Time to Designate the Record in the above-entitled case.

/s/ MYRTLE R. CLARE.

Subscribed and sworn to before me this 6th day of December, 1949.

[Seal] /s/ OLGA T. STEGER,
Deputy Clerk.

[Endorsed]: Filed Dec. 6, 1949.

[Title of District Court and Cause.]

DESIGNATION OF THE RECORD
ON APPEAL

To the Clerk of the District Court of the United States for the Fourth District of Alaska:

You are hereby requested to prepare, certify, and

transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, with reference to the notice of appeal heretofore filed by the Defendant in the above cause, transcript of the record in the above cause, prepared and transmitted as required by law and by rules of said court, and to include in said transcript of record the following original documents, to wit:

1. The entire record designated on the previous appeal in this case and the complete record and all the proceedings and evidence in this Court subsequent to the judgment of the United States Supreme Court on May 31, 1949.

2. This designation of record.

Dated at Fairbanks, Alaska, this 19th day of January, 1950.

/s/ EVERETT W. HEPP,
United States Attorney.

[Endorsed]: Filed Jan. 10, 1950.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

I, Myrtle R. Clare, being first duly sworn, on oath depose and say:

That I am a Clerk employed in the office of the

United States Attorney for the Fourth Division,
Territory of Alaska;

That on the 19th day of January, 1950, I mailed to Medley & Haugland, attorneys at law, Seattle 4, Washington, a certified true and correct copy of the Designation of the Record on Appeal in the above-entitled case.

/s/ MYRTLE R. CLARE.

Subscribed and sworn to before me this 19th day of January, 1950.

[Seal] /s/ OLGA T. STEGER,
Deputy Clerk.

[Endorsed]: Filed Jan. 10, 1950.

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

This is to certify that the undersigned attorneys for all of the above-named plaintiffs have been served by mail, as required by Rule 5(b) of the Federal Rules of Civil Procedure, with Designation of the Record on Appeal in the above-entitled cause on the 23rd day of January, 1950, at Seattle, Washington.

/s/ FRANK L. MECHEM,
/s/ W. C. ARNOLD,
/s/ EDWARD F. MEDLEY,

Attorneys for All of the Above-Named Plaintiffs.

[Endorsed]: Filed January 25, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF THE DISTRICT COURT TO TRANSCRIPT OF RECORD

I, John B. Hall, Clerk of the District Court, Fourth Judicial Division, Territory of Alaska, do hereby certify that the foregoing, consisting of 481 pages, constitutes a full, true, and correct transcript of the record on appeal in the above-entitled cause, and was made pursuant to the Designation of the Record on Appeal, page 479 of this Transcript, filed by the defendant and appellant, and by virtue of the said Appeal and Citation issued in this cause, and is the return thereof in accordance therewith, and

I do certify that the Index thereof, consisting of pages "a" and "b," is a correct index of said Transcript of Record; that pages "c" and "d" is a correct list of all Exhibits admitted in this cause; and that page "e" is a correct list of the attorneys of record.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 31st day of January, 1950.

[Seal] /s/ JOHN B. HALL,
Clerk of the District Court, Fourth Judicial Division, Territory of Alaska.

[Endorsed]: No. 12469. United States Court of Appeals for the Ninth Circuit. Frank Hynes, Regional Director, Fish and Wildlife Service, Department of Interior, Appellant, vs. Grimes Packing Co., Kadiak Fisheries Company, Libby, McNeill and Libby, Frank McConaghy & Co., Inc., Parks Canning Co., Inc., San Juan Fishing & Packing Co. and Uganik Fisheries, Inc., Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Fourth Division.

Filed February 6, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12469

FRANK HYNES, Regional Director, Fish and
Wildlife Service, Department of the Interior,
Appellant,

vs.

GRIMES PACKING CO., KADIAK FISHER-
IES COMPANY, LIBBY, McNEILL AND
LIBBY, FRANK McCONAGHY & CO., INC.,
PARKS CANNING CO., INC, SAN JUAN
FISHING & PACKING CO., and UGANIK
FISHERIES, INC.,

Appellees.

APPELLANT'S STATEMENT OF POINTS

The appellant respectfully submits the following statement of points upon which he intends to rely on appeal:

1. The district court erroneously contravened the mandate of the Supreme Court in its judgment on the mandate, entered September 19, 1949, enjoining Frank Hynes and others acting in concert with him from enforcing the repealed regulation or any other regulations of like import which may hereafter be promulgated by the Department of the Interior through its Fish and Wildlife Service or otherwise.

2. The district court erroneously contravened the mandate of the Supreme Court in refusing to dis-

solve the temporary injunction entered July 18th, 1946.

3. The district court erroneously contravened the mandate of the Supreme Court in refusing to dismiss the action.

FRANK HYNES,
Regional Director, Fish and Wildlife Service, Department of the Interior, Appellant.

By /s/ J. EDWARD WILLIAMS,
Acting Assistant Attorney
General.

/s/ ROGER P. MARQUIS,
Attorney, Department of Justice, Washington,
D. C.

[Endorsed]: Filed Feb. 6, 1950.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF THE RECORD
TO BE PRINTED

The appellant, Frank Hynes, Regional Director, Fish and Wildlife Service, Department of the Interior, hereby designates the following parts of the record and proceedings for printing:

1. Order of this Court authorizing consideration of the printed record and proceedings before this Court in *Hynes v. Grimes Packing Co.*, No. 11,585.
2. The complete record and all the proceedings

and evidence in the district court subsequent to the decision of the United States Supreme Court in *Hynes v. Grimes Packing Co.*, No. 24, October Term, 1948, decided May 31, 1949, 337 U. S. 86, including the opinion and mandate of that Court directing the action to be taken by the district court.

3. Order of this Court for consideration of original exhibits.

4. Statement of points filed in this Court.

5. This designation.

FRANK HYNES,
Regional Director, Fish and Wildlife Service, Department of the Interior, Appellant.

By /s/ J. EDWARD WILLIAMS,
Acting Assistant Attorney
General.

/s/ ROGER P. MARQUIS,
Attorney, Department of Justice, Washington,
D. C.

[Endorsed]: Filed February 6, 1950.

[Title of U. S. Court of Appeals and Cause.]

MOTION FOR CONSIDERATION OF THE
RECORD AND PROCEEDINGS IN CASE
No. 11,585

Frank Hynes, Regional Director, Fish and Wildlife Service, Department of the Interior, appel-

lant, respectfully shows this Court as follows:

1. In *Hynes v. Grimes Packing Co.*, No. 11,585, this Court affirmed a decree of the United States District Court for the Territory of Alaska enjoining appellant from enforcing a certain order and a regulation of the Secretary of the Interior. Subsequently, the United States Supreme Court, in *Hynes v. Grimes Packing Co.*, 337 U. S. 86 (1949), vacated the decrees of this Court and of the district court and remanded the case to the district court for action pursuant to its opinion and mandate. This is an appeal from the judgment entered by the district court on the mandate of the Supreme Court.

2. The record and proceedings of the district court printed and used in the first appeal to this Court are a part of the record for use in the instant appeal.

Wherefore, Frank Hynes, appellant, moves this Court for an order providing that the printed record and the proceedings before this Court in No. 11,585, including its opinion and judgment, shall be considered as part of the record in the instant case with the same force and effect as though the same were incorporated in and made a part of the printed transcript of record.

FRANK HYNES,

Regional Director, Fish and Wildlife Service, Department of the Interior, Appellant.

By /s/ J. EDWARD WILLIAMS,

Acting Assistant Attorney
General.

/s/ ROGER P. MARQUIS,
Attorney, Department of Justice, Washington,
D. C.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER BONE,
U. S. Circuit Judges.

[Title of U. S. Court of Appeals and Cause.]

MOTION FOR CONSIDERATION OF ORIGINAL EXHIBITS

Frank Hynes, Regional Director, Fish and Wildlife Service, Department of the Interior, appellant, respectfully shows this Court as follows:

1. In *Hynes v. Grimes Packing Co.*, No. 11,585, this Court affirmed a decree of the United States District Court for the Territory of Alaska enjoining appellant from enforcing a certain order and a regulation of the Secretary of the Interior. Subsequently, the United States Supreme Court, in *Hynes v. Grimes Packing Co.*, 337 U. S. 86 (1949), vacated the decrees of this Court and of the district court and remanded the case to the district court for action pursuant to its opinion and mandate. This is an appeal from the judgment entered by

the district court on the mandate of the Supreme Court.

2. Appellant has moved this Court for an order providing for consideration in the instant appeal of the record and proceedings in No. 11,585 without re-printing them. In said Case No. 11,585, this Court permitted consideration of original exhibits without reproducing them in the printed record (see R. 494-495).

Wherefore, appellant moves this Court for an order authorizing the consideration of the original exhibits in Case No. 11,585, with the same force and effect as though the same were incorporated in the printed record.

FRANK HYNES,

Regional Director, Fish and Wildlife Service, Department of the Interior, Appellant.

By /s/ J. EDWARD WILLIAMS,
Acting Assistant Attorney
General.

/s/ ROGER P. MARQUIS,
Attorney, Department of Justice, Washington, D. C.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER BONE,
U. S. Circuit Judges.

**In the United States Court of Appeals
for the Ninth Circuit**

**FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE
SERVICE, DEPARTMENT OF THE INTERIOR, APPELLANT**

v.

**GRIMES PACKING Co., KADIAK FISHERIES COMPANY,
LIBBY, McNEILL AND LIBBY, FRANK McCONAGHY &
Co., INC., PARKS CANNING Co., INC., SAN JUAN FISH-
ING & PACKING Co., AND UGANIK FISHERIES, INC.,
APPELLEES**

**APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY
OF ALASKA, FOURTH DIVISION**

BRIEF FOR THE APPELLANT

A. DEVITT VANECH,
Assistant Attorney General.

EVERETT W. HEPP,
*United States Attorney,
Fairbanks, Alaska.*

**ROGER P. MARQUIS,
S. BILLINGSLEY HILL,**
*Attorneys, Department of Justice,
Washington, D. C.*

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14 Fed. Reg. June 17, 1949, p. 3283	4

**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,469

FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE
SERVICE, DEPARTMENT OF THE INTERIOR, APPELLANT

v.

GRIMES PACKING CO., KADIAK FISHERIES COMPANY,
LIBBY, McNEILL AND LIBBY, FRANK McCONAGHY &
CO., INC., PARKS CANNING CO., INC., SAN JUAN FISH-
ING & PACKING CO., AND UGANIK FISHERIES, INC.,
APPELLEES

*APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY
OF ALASKA, FOURTH DIVISION*

BRIEF FOR THE APPELLANT

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal from a judgment on the mandate of the Supreme Court entered by the district court on September 19, 1949, permanently enjoining the appellant and others from enforcing certain orders and regulations of the Secretary of the Interior with respect to fishing in Alaskan coastal waters (R. 78-80). Notice of appeal was filed November 17, 1949 (R. 82). The juris-

diction of the district court was invoked under the Act of June 6, 1900, 31 Stat. 322, as amended, 48 U.S.C. sec. 101, 41 Stat. 1203. The jurisdiction of this Court rests on 28 U.S.C. sec. 1294(2).

QUESTION PRESENTED

Whether the district court contravened the mandate of the Supreme Court by ruling that the Secretary of the Interior had not taken timely steps to comply with the determinations of the Supreme Court and, therefore, permanently enjoining enforcement of the repealed Alaska Fisheries Regulation 208.23(r) and any other regulation of substantially like import which may hereafter be promulgated by the Department of the Interior through its Fish and Wildlife Service or otherwise.

STATEMENT

This action was instituted by the appellees on June 25, 1946, to have declared invalid Public Land Order No. 128, 8 Fed. Reg. 8557, wherein the Secretary of the Interior, on May 22, 1943, included in the Karluk Indian Reservation on Kodiak Island, Alaska, coastal waters extending 3,000 feet from the shore line. In addition, the action sought to enjoin the enforcement of Alaska Fisheries Regulation 208.23(r), Title 50, C.F.R., 11 Fed. Reg. 3105, issued by the Secretary of the Interior on March 22, 1946, wherein he set apart the same waters as a reserved fishing area, under the White Act of June 6, 1924, 43 Stat. 464, as amended June 18, 1926, 44 Stat. 752, 48 U.S.C. secs. 221-228, and closed it to all fishing except by natives in possession of such reservation and their licensees (Orig. Rec. 2-18).¹

¹ This Court authorized consideration of the printed record in No. 11,585, the first appeal in this case, as a part of the record in the instant appeal without reprinting (R. 92-94). References to that original record are designated as "Orig. Rec." as distinguished from "R." which refers to the new matter printed for the instant appeal, No. 12,469.

The district court granted a preliminary injunction on July 18, 1946, prohibiting enforcement of Alaska Fisheries Regulation 208.23(r) (Orig. Rec. 37). Thereafter, following trial of the issues, it found both the Land Order and the Fisheries Regulation to be invalid and made the temporary injunction permanent on November 6, 1946 (Orig. Rec. 40).

On appeal by Frank Hynes, this Court affirmed the district court on November 21, 1947. *Hynes v. Grimes Packing Co.*, 165 F. 2d 323.

Thereafter the Supreme Court upheld the inclusion by the Secretary of the Interior of coastal waters in the Karluk Indian Reservation by Public Land Order 128, but declared invalid the Alaska Fisheries Regulation 208.23(r). In addition, it held that the Indians could charge license fees for fishing in those waters of their reservation, but that such fees should not exceed the estimated approximate cost of policing the area. However, rather than remanding the case with instructions as to the precise orders to be entered the Supreme Court said (R. 53-55) :

This is an equitable proceeding in which the respondents seek protection against unlawful action by petitioner, the Regional Director of the Fish and Wildlife Service of the Department of the Interior. The interests of respondents, the Indians of Karluk Reservation, and the efforts of the Department of the Interior to administer its responsibilities fairly to fishermen and Indians are involved. These are questions of public policy which equity is alert to protect. This Court is far removed from the locality and cannot have the understanding of the practical difficulties involved in the conflicts of interest that is possessed by the District Court. Therefore we think it appropriate for us to refrain from now entering a final order disposing definitively of the controversy. With our conclusion on the law as to the establishment of the reservation and the in-

validity of the regulation before them, the Department and the parties should have a reasonable time, subject to the action of the District Court on the new proposals, to adjust their affairs so as to comply with our determinations.

We therefore vacate the decrees of the District Court and the Court of Appeals and remand this proceeding to the District Court with directions to allow thirty days from the issuance of our mandate for the Secretary of the Interior to give consideration to the effect of our decision. Unless steps are taken in this proceeding the District Court, on the expiration of thirty days, shall enter a decree enjoining the defendant Hynes and all acting in concert with him, substantially as ordered in the permanent injunction entered November 6, 1946. If timely steps are taken, the District Court will, of course, be free to enter such orders as it may deem proper and not inconsistent with the present decision. Pending the entry of further orders by the District Court, the preliminary injunction entered July 18, 1946, shall apply to protect the rights of the respondents.

On June 13, 1949, before issuance of the mandate and pursuant to the requirement in the opinion that "timely steps" be taken to comply with the Supreme Court's determinations, the Secretary of the Interior ordered Regulation 208.23(r)² to be deleted from the Alaska Fisheries Regulations (R. 74). The amendment by deletion is set forth at page 3283 of 14 Federal Register, June 17, 1949, and a copy of it is printed in the appendix hereto, *infra*, p. 12.

The mandate of the Supreme Court issued to the district court on July 1, 1949, "with directions and for proceedings in conformity with the opinion of this court" (R. 67-69). It was spread upon the records of

² This regulation had been redesignated as paragraph (r) of section 108.24 of the then current regulations. 13 Fed. Reg. 8695.

the district court on July 20, 1949 (R. 69). On that date, the appellant, Frank Hynes, in order to be within the thirty days from issuance of the mandate allowed by the Supreme Court for the taking of timely steps "in this proceeding," moved the district court for an order dissolving the temporary and permanent injunctions and dismissing the action on the ground that the invalid regulation had been deleted so that there was no longer need for the injunctive relief sought in the cause (R. 70-74).

The Secretary of the Interior in compliance with the Supreme Court's decision proposed and on July 25, 1949, the Council of the Native Village of Karluk approved and passed an amended ordinance providing for the issuance of licenses without discrimination, except that the two dollar license fee for residents of Alaska was continued and the license fee for commercial fishing by non-residents was reduced from forty dollars per person per annum to five dollars. The ordinance prohibited fishing without such a license but did not continue the five hundred dollar fine previously provided. A copy of this ordinance, approved by the Secretary of the Interior on September 8, 1949, is printed in the appendix, *infra*, pp. 12-13; cf. R. 50-51.

Subsequently, on September 19, 1949, the appellees filed a motion in the district court entitled "Motion for Judgment on the Mandate" wherein they sought entry of a decree "enjoining the defendant Hynes and all acting in concert with him in accordance with the terms of the permanent injunction entered herein on November 6, 1946" (R. 75-76). They represented such action to be in accord with the opinion and mandate of the Supreme Court (R. 76).

On the same day, the district court denied appellant's motion for dismissal and granted appellees' motion for a permanent injunction (R. 76-77). Judgment on the

mandate was entered on September 19, 1949, in which the court ruled that "no steps were taken in this proceeding in accordance with the decision of the Supreme Court and the mandate entered thereon" (R. 79). It granted a permanent injunction enjoining appellant and all others in concert with him from enforcing the repealed regulation or "any other regulations of like or substantially like import which may hereafter be promulgated or attempted to be promulgated by the Department of the Interior of the United States of America through its Fish and Wildlife Service or otherwise" (R. 80).

Appellant thereupon applied to the Supreme Court for a writ of mandamus directing the district court (a) to vacate the judgment on the mandate enjoining appellant and others acting in concert with him from enforcing the repealed regulation or any other regulations of like import which may hereafter be promulgated by the Department of the Interior through its Fish and Wildlife Service or otherwise, (b) to dissolve the temporary injunction, and (c) to dismiss the action in accordance with the opinion and mandate of the Supreme Court. The application was denied by the Supreme Court on January 9, 1950, on authority of *Ex Parte Fahey*, 332 U. S. 258 (1947), which holds that the Supreme Court will not entertain an original proceeding for mandamus where there is an adequate remedy by appeal to the Court of Appeals. *Hynes, Regional Director v. Pratt*, 338 U. S. 908.

This appeal, noted on November 17, 1949, was then perfected (R. 82, 84).

SPECIFICATION OF ERRORS

The statement of points relied upon by Frank Hynes on this appeal (R. 90-91) may be summarized as follows:

The district court erroneously contravened the mandate of the Supreme Court:

(a) By enjoining Frank Hynes and others acting in concert with him from enforcing the repealed regulation or any other regulations of like import which may hereafter be promulgated by the Department of the Interior through its Fish and Wildlife Service or otherwise.

(b) By refusing to dismiss the temporary injunction entered July 18th, 1946.

(c) By refusing to dismiss the action.

ARGUMENT

The District Court's Judgment on the Mandate Is Contrary to the Mandate of the Supreme Court

The Supreme Court vacated the permanent injunction entered by the district court on November 6, 1946 (R. 54). It allowed the parties thirty days from issuance of the mandate "to adjust their affairs so as to comply with our determinations" (R. 54). Those "determinations" were that the establishment of the Indian Reservation including coastal waters was valid, that Alaska Fisheries Regulation 208.23(r) was invalid, and that the license fees for fishing in the reservation waters should not exceed an estimated approximate cost of policing the area (R. 41, 47, 49-50, 52, 54).

It directed the district court to enter an injunction substantially like the one of November 6, 1946, *only* if timely steps were not taken to comply with those determinations. The Supreme Court expressly refused to direct the hand of the Secretary of the Interior and alerted the district court to the same restraint. This cautioning of the district court appears, in addition to the express language of the opinion, from the cases cited in footnote 60, R. 55, to the sentence direct-

ing a permanent injunction if no steps were taken by the Secretary. All of those cases emphasize judicial self-restraint from interfering in administrative matters.

The Supreme Court, of course, left the district court free "to enter such orders as it may deem proper." But these orders were to effectuate adjustment by the parties of their problems to comply with the Supreme Court's determinations. They were not to be "inconsistent with the present decision" (R. 55).

Plainly, the prompt deletion of Alaska Fisheries Regulation 208.23(r) from the current regulations prior to issuance of the mandate and the changes effected in the ordinance³ of the Karluk Village within thirty days after issuance of the mandate constituted timely steps eliminating threat of enforcement of the regulation or excessive license fees in full compliance with the decision of the Supreme Court. Certainly, in view of the Supreme Court's forbearance to direct the action to be taken by the Secretary of the Interior, he was not compelled to issue a new set of regulations or to work out some complicated plan if, in his opinion, the interests of the Indians and of fish conservation did not require it.

³ The new ordinance was not introduced in evidence in the court below. However, it represents the official act both of an incorporated village in Alaska and of the Secretary of the Interior. Either is a proper subject of judicial notice. Alaska Compiled Laws, 1933, sec. 3441; Act of June 18, 1934, secs. 10, 16 and 17, 48 Stat. 984, 986, 987, 988; Act of May 1, 1936, sec. 1, 49 Stat. 1250; *Caha v. United States*, 152 U.S. 211, 221-222 (1894); *Tucker v. Texas*, 326 U.S. 517, 519 (1946); *Labor Board v. Atkins Co.*, 331 U.S. 398, 406 (1947); *Sprinkle v. United States*, 141 Fed. 811, 819-820 (C.C.A. 4, 1905); *Milwaukee Mechanics Ins. Co. v. Oliver*, 139 F. 2d 405, 407 (C.C.A. 5, 1944). That introduction of the ordinance in evidence in the district court would not have affected its ruling is apparent from the fact that the appellees did not assert excessiveness of the license fees and the district court did not enjoin enforcement of those either previously or presently required.

It is not known, nor did the district court suggest, what additional action the Secretary was expected to take on behalf of the appellees. The decision of the Supreme Court required none. It was sufficient, under the opinion, that the Secretary "give consideration" to the matter and make a decision as to his course of action not inconsistent with the opinion and within the time allowed (R. 54). He did that. Further forcing of the hand of the Secretary is an unwarranted invasion by the court into the executive functions of the Government. "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." *Decatur v. Paulding*, 14 Pet. 497, 516 (1840). Thus the district court's ruling that "no steps were taken in this proceeding in accordance with the decision of the Supreme Court" is both erroneous in fact and a patent misconstruction of the decision. Accordingly, its judgment on the mandate enjoining enforcement of the repealed regulation because further steps were not taken is contrary to the mandate of the Supreme Court. Apparently appellees will be satisfied with nothing short of the permanent injunction originally decreed. But the Supreme Court held in vacating that injunction that they were not entitled to it.

Moreover, the judgment of the district court further contravenes the mandate in enjoining enforcement of "any other regulations of like or substantially like import which may hereafter be promulgated or attempted to be promulgated by the Department of the Interior of the United States of America through its Fish and Wildlife Service or otherwise." That injunction, purportedly on the basis of the mandate, goes wholly beyond the mandate or the relief sought at any

time. The question of future regulations by the Fish and Wildlife Service was not in the record and was not reviewed by the Supreme Court. Control of future regulations was not asked for in the complaint. It was not in the original injunctions and, accordingly, does not meet the requirement of the Supreme Court that any new injunction be "substantially as ordered" in the original permanent injunction. Finally, it was not even asked for in appellees' motion for judgment pursuant to which it was decreed (R. 75-76).

Even more remote to the scope of this case are *future* regulations issued by authority *other* than the Fish and Wildlife Service. An injunction of such broad range unwarrantedly stands athwart many otherwise valid and essential regulations of the Department of the Interior. For example, it is now uncertain whether the Secretary may promulgate and enforce regulations, under present or future authority other than the White Act, relative to trespass and interference with the Indians on the waters of the legally established Karluk Indian Reservation.

There has been no threat to promulgate and enforce a regulation "like or substantially like" the one which the Supreme Court held invalid. No such threat was averred by the appellees and no evidence was offered to or suggested by the district court as a basis for its ruling. On the contrary, the existence of the decision of the Supreme Court and the deletion of the objectionable regulation are strong evidence that no such threat exists. The Courts "must assume that the Administrator will * * * act as conscientiously within the bounds of the power given him by Congress as he would have done initially had he limited himself to his authority." *Addison v. Holly Hill Co.*, 322 U. S. 607, 620 (1944).

CONCLUSION

For the foregoing reasons, it is submitted that the case should be remanded to the district court with directions (a) to vacate its judgment on the mandate, (b) to dissolve the temporary injunction and (c) to dismiss the action.

Respectfully,

A. DEVITT VANECH,
Assistant Attorney General.

EVERETT W. HEPP,
*United States Attorney,
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APRIL 1950.

APPENDIX

[Federal Register of June 17, 1949, 14 F. R. 3283]

TITLE 50—WILDLIFE

Chapter 1—Fish and Wildlife Service,
Department of the Interior

Subchapter F—Alaska Commercial Fisheries

PART 108—KODIAK AREA, CLOSED WATERS

Basis and purpose. Because of the Supreme Court's decision dated May 31, 1949, in the case of "Hynes v. Grimes Packing Co. et al." respecting the validity of paragraph (r) of § 208.23 of the Alaska commercial fisheries regulations for 1946, which has been redesignated as paragraph (r) of § 108.24 of the current Alaska commercial fisheries regulations (13 F. R. 8695), the following action is taken, to become effective immediately upon publication in the FEDERAL REGISTER:

Paragraph (r) of § 108.24 of Part 108 is deleted.

(34 Stat. 263, 478, as amended, 43 Stat. 464, as amended; 48 U. S. C. 221-247.)

Dated: June 13, 1949.

[SEAL.]

WILLIAM E. WARNE,
Assistant Secretary of the Interior.

AN ORDINANCE

"SECTION 1. That it shall be unlawful for any person, partnership, firm, association or corporation, to fish for, take or catch any fish, or to operate any fishing vessel, gear equipment within the waters of the Karluk Reservation except under a permit issued by the Native Village of Karluk, for which the fee shall be as follows:

"(A) For residents of the Territory of Alaska
\$2.00

"(B) For non-residents of the Territory of
Alaska \$5.00

Provided further, that a person to qualify for a resident (Class A) permit must have resided in the Terri-

tory of Alaska for three consecutive years prior to the date of his application, or request, for a permit.

“SECTION 2. The possession of fish upon any vessel within said waters without a permit shall constitute prima facie evidence of a violation of this ordinance.

“SECTION 3. The grant of a permit pursuant to section 1 hereof for the operation of any fishing vessel, gear, or equipment shall extend to all persons operating such vessel, gear, or equipment for the purpose of fishing under the direction of the permittee.

“SECTION 4. Any person violating this ordinance may be treated as a trespasser, may be removed from the reservation, and if his permit is revoked, shall be ineligible in the future to obtain a permit.

“SECTION 5. The Council of the Native Village of Karluk shall approve the form of permit to be issued hereunder, and permits shall be issued by the Council, or a person duly designated by it.

“SECTION 6. This ordinance shall become effective immediately upon its passage and approval.”

Passed and approved this date of July 25, 1949.

Approved:

(S.) LARRY ELLANAK,
*President, Native Village of
Karluk, Alaska.*

Attest:

(S.) CHARLES CHRISTENSEN,
*Secretary, Native Village
of Karluk, Alaska.*

No. 12,469

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

**FRANK HYNES, Regional Director, FISH AND WILDLIFE
SERVICE, Department of the Interior,**

Appellant,

v.

**GRIMES PACKING CO., KADIAK FISHERIES COMPANY,
LIBBY, McNEILL & LIBBY, FRANK McCONAGHY & CO.,
INC., PARKS CANNING CO., INC., SAN JUAN FISHING
& PACKING CO., and UGANIK FISHERIES, INC.,**

Appellees.

**Appeal from the District Court for the Territory of Alaska,
Fourth Division**

BRIEF FOR THE APPELLEES

**EDWARD F. MEDLEY,
FRANK L. MECHEM,
W. C. ARNOLD,**

Seattle, Washington,

Attorneys for Appellees.

**COVINGTON, BURLING, RUBLEE,
O'BRIAN & SHORB,
Washington, D. C.,**

Of Counsel.

May, 1950

FILED

MAY 21 1950

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Washington, D. C.,**

Of Counsel.

May, 1950

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& PACKING CO., and UGANIK FISHERIES, INC.,**

Appellees.

BRIEF FOR THE APPELLEES

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal from a judgment of the district court entered on the mandate of the Supreme Court on September 19, 1949, enjoining appellant and those acting in concert with him from enforcing a certain regulation of the Secretary of the Interior with respect to fishing in Alaskan coastal waters. (R. 78-80.) Notice of appeal was filed on November 17, 1949. (R. 82.) Appellees invoked the jurisdiction of the district court under the Act of June 6, 1900, 31 Stat. 322, as amended, 48 U. S. C. § 101, 41 Stat. 1203. The jurisdiction of this Court rests on 28 U. S. C. § 1294 (2).

QUESTION PRESENTED

Whether the district court complied with the Supreme Court's mandate in determinating:

(1) that "timely steps" were not "taken in this pro-

ceeding," within the intendment of the Supreme Court's opinion and mandate; and

(2) that the decree entered enjoined the appellant and all acting in concert with him "substantially as ordered" by the earlier permanent injunction issued in this case and thus was in accordance with the Supreme Court's opinion and mandate.

STATEMENT

Appellees began this action June 25, 1946, asking an injunction against the enforcement of Alaska Fisheries Regulation 208.23 (r), Title 50 C. F. R., 11 Fed. Reg. 3105, issued March 22, 1946, in which the Secretary of the Interior set apart as a reserved fishing area certain waters extending 3,000 feet from the shore line, which were a part of the Karluk Indian Reservation, Kodiak Island, Alaska. This regulation, purportedly issued under the White Act of June 6, 1924, 43 Stat. 464, as amended, June 18, 1926, 44 Stat. 752, 48 U. S. C. §§ 221-228, closed these waters to all fishing except "by natives in possession of said reservation," or "by other persons under authority granted by said natives." Frank Hynes, Regional Director, Fish and Wildlife Service, Department of Interior, appellant herein, was named as defendant. The action also sought to have declared invalid Public Land Order No. 128, 8 Fed. Reg. 8557, issued May 22, 1943, in which the Secretary of the Interior included in the Karluk Indian Reservation the coastal waters just described. (Orig. Rec. 2-18.)

A preliminary injunction against the enforcement of Regulation 208.23 (r) was issued. (Orig. Rec. 37.) After trial, the district court held that regulation invalid and is-

sued a permanent injunction against its enforcement. (Orig. Rec. 40.) The court also held the Land Order invalid. (Orig. Rec. 42.) *Grimes Packing Co. v. Hynes*, 67 F. Supp. 43.

On appeal by the defendant, appellant herein, this Court affirmed the district court on November 21, 1947. *Hynes v. Grimes Packing Co.*, 165 F. 2d 323.

On certiorari the Supreme Court sustained this Court in an opinion holding invalid Alaska Fisheries Regulation 208.23 (r), while upholding the inclusion of the coastal waters in the Karluk Indian Reservation by Public Land Order No. 128. (R. 40, 49-50.) Part IV of the Court's opinion, dealing with the question of relief, recognized that the holding "that the White Act cannot be used to create a monopoly in the Indians" and "that coastal waters may be included in the reservation waters" established "a different basis for administrative and judicial conclusions" concerning "the administration of the Karluk Reservation and the protection of the fishing preserves." The 1945 ordinance of the Native Village of Karluk, said the Court, "must be considered." Describing this ordinance, the Court pointed out that the ordinance, which antedated the invalid regulation, was evidently based on the theory that the creation of the reservation gave exclusive fishing rights to the natives in possession; that, because of a provision in the corporate charter of the Native Village of Karluk, fishing permits authorized by the ordinance had to be approved by the Secretary of the Interior or his authorized representative; that nothing in the record indicated "the reasons for the \$2 fee for residents or the \$40 fee for nonresidents or their relation to the cost of policing the area"; and that, apparently, the Department's only direct control over an ordinance it had once approved was "by approval or disapproval of

amendments." (R. 50-53.) The Court continued with the following directions as to relief:

"This is an equitable proceeding in which the respondents seek protection against unlawful action by petitioner, the Regional Director of the Fish and Wildlife Service of the Department of the Interior. The interests of respondents, the Indians of Karluk Reservation, and the efforts of the Department of the Interior to administer its responsibilities fairly to fishermen and Indians are involved. These are questions of public policy which equity is alert to protect. This Court is far removed from the locality and cannot have the understanding of the practical difficulties involved in the conflicts of interest that is possessed by the District Court. Therefore we think it appropriate for us to refrain from now entering a final order disposing definitively of the controversy. With our conclusion on the law as to the establishment of the reservation and the invalidity of the regulation before them, the Department and the parties should have a reasonable time, subject to the action of the District Court on the new proposals, to adjust their affairs so as to comply with our determinations.

"We therefore vacate the decrees of the District Court and the Court of Appeals and remand this proceeding to the District Court with directions to allow thirty days from the issuance of our mandate for the Secretary of the Interior to give consideration to the effect of our decision. Unless steps are taken in this proceeding the District Court, on the expiration of thirty days, shall enter a decree enjoining the defendant Hynes and all acting in concert with him substantially as ordered in the permanent injunction entered November 6, 1946. If

timely steps are taken, the District Court will, of course, be free to enter such orders as it may deem proper and not inconsistent with the present decision. Pending the entry of further orders by the District Court, the preliminary injunction entered July 18, 1946, shall apply to protect the rights of the respondents." (R. 53-55.)

The mandate of the Supreme Court issued to the district court on July 1, 1949. On June 13, 1949, the Secretary of the Interior had ordered Regulation 208.23 (r), which had been redesignated 108.24 (r) (13 Fed. Reg. 8695), and which the Supreme Court, as well as this Court and the district court, had held void, to be deleted from the Alaska Fisheries Regulations. (R. 73-74.) Solely on the ground that this void regulation had been deleted, the appellant, on July 20, 1949, moved the district court for an order dissolving the temporary and permanent injunctions and dismissing the action. (R. 70-71.)

Neither appellant nor the Secretary of the Interior took any other "steps . . . in this proceeding" during the thirty days following the issuance of the Supreme Court's mandate.¹ On September 19, 1949, after the expiration of the thirty days, the appellees filed in the district court a motion for judgment on the mandate, asking that court to enter

¹On July 25, 1949, we are informed by appellant's brief in this Court, the Council of the Native Village of Karluk amended its ordinance by lowering the fishing permit fee for nonresidents from \$40 to \$5 and eliminating the provision for a \$500 fine for fishing without a license, though the prohibition against unlicensed fishing remained. The ordinance was otherwise virtually identical with its predecessor. The Secretary of the Interior approved this amended ordinance on September 8, 1949, some forty days after the expiration of the thirty days provided for in the Supreme Court's mandate. This action with respect to the ordinance does not appear in the record and was apparently not called to the attention of the district court.

“a decree enjoining the defendant Hynes and all acting in concert with him in accordance with the terms of the permanent injunction entered on November 6, 1946,” as directed by the opinion and mandate of the Supreme Court. (R. 75-76.)

The district court, on the same day, denied the appellant’s motion for dismissal, granted appellees’ motion for a permanent injunction (R. 76-77), and entered judgment on the mandate, ruling that “no steps were taken in this proceeding in accordance with the decision of the Supreme Court and the mandate entered thereon.” (R. 79.) The court issued a permanent injunction enjoining the appellant and persons acting in concert with him from enforcing “Section 208.23 (r) of the 1946 Alaska Fisheries General Regulations or any other regulations of like or substantially like import which may hereafter be promulgated or attempted to be promulgated by the Department of the Interior of the United States of America through its Fish and Wildlife Service or otherwise.” (R. 79-80.)

Appellant then applied to the Supreme Court for a writ of mandamus directing the district court to vacate the judgment on the mandate, dissolve the temporary injunction, and dismiss the action. The Supreme Court denied this application on January 9, 1950, citing *Ex parte Fahey*, 332 U. S. 258 (1947), which held that the remedy of mandamus is not available as a substitute for an appeal. *Hynes v. Pratt*, 338 U. S. 908.

Appellant then perfected this appeal, which had been noted on November 17, 1949. (R. 82, 84.)

ARGUMENT

Timely “steps . . . in this proceeding” Were Not Taken by the Appellant or the Secretary of the Interior, Within the Intendment of the Supreme Court’s Mandate.

The only action taken by the Secretary of the Interior or the appellant within thirty days from the issuance of the Supreme Court’s mandate was the deletion of Regulations 208.23 (r), and the motion to dismiss based on that deletion. (R. 70-71.) That action did not constitute “steps . . . taken in this proceeding” within the meaning of the Supreme Court’s opinion.

To revoke the void regulation was to do nothing. The Supreme Court, having already declared Regulation 208.23 (r) invalid and unenforceable, could hardly have meant that the thirty days allowed “for the Secretary of the Interior to give consideration to the effect of our decision,” was to be used by the Secretary in deciding whether to revoke that invalid regulation.

It is, of course, not for the district court or the appellees to say what action the Secretary ought to have taken. If the Secretary did not understand the mandate, he could have asked, through appellant, for its clarification. The decision as to what action should be taken was an administrative determination which only the Secretary could make, as the Supreme Court indicated in its opinion. (R. 50, 53-54.)

Even when the Secretary, presumably after due consideration, had determined that nothing should be done, he

could have at least made timely disclosure of his determination to the district court and indicated, if that was his decision, that he would not disturb the status quo. (Cf. Appellant's Brief, p. 9.) Instead, he chose to stand upon the purely formal act of revocation of the void regulation, without committing himself as to the future.

Appellant seems to suggest that the amendment of the Karluk Village ordinance by lowering the license fee for nonresidents and eliminating the \$500 penalty for violation constituted a step of the kind contemplated by the Supreme Court. (Appellant's Brief, p. 8.) Even assuming that these two alterations in the ordinance that troubled the Supreme Court in so many respects would have had any legal significance, the appellant nevertheless could not rely upon them because he did not call them to the attention of the district court, so far as appears from the record. *Hebets v. Scott*, 152 F. 2d 739, 741 (9th Cir. 1945); *Apex Smelting Co. v. Burns*, 175 F. 2d 978, 982 (7th Cir. 1949) (collecting cases); see *Hormel v. Helvering*, 312 U. S. 552, 556 (1941). But an even more fundamental objection to reliance upon this amendment is that although, as the Supreme Court noted, it had to be approved by the Secretary or his authorized representative (Supreme Court's opinion, R. 51, 53), it did not receive that approval until after the thirty days following the issuance of the mandate. Thus in no sense can it be argued that "timely steps" were taken in connection with the ordinance "in this proceeding."

In issuing a permanent injunction upon the failure of the Secretary and the appellant to take any timely steps in this proceeding, the district court was not "forcing the hand of the Secretary," as the appellant suggests. (Appel-

lant's Brief, p. 9.)² Rather that court was following the explicit command of the Supreme Court, which had directed that:

"Unless steps are taken in this proceeding the District Court, on the expiration of thirty days, shall enter a decree enjoining the defendant Hynes and all acting in concert with him substantially as ordered in the permanent injunction entered November 6, 1946." (R. 55.)

II.

The Decree Entered by the District Court Enjoins Appellant and Those Acting in Concert with Him "substantially as ordered in the permanent injunction entered November 6, 1946," and so Complies With the Mandate of the Supreme Court.

Since "timely steps" were not taken by the Secretary, the district court had no choice except to enter an injunction against appellant. It is suggested that the injunction entered was not consistent with the mandate. That injunction is substantially identical with the injunction of November 6, 1946, except that, in addition to enjoining the enforcement of Regulation 208.23 (r), it also enjoins the enforcement of "any other regulations of like or substantially

²Decatur v. Paulding, 14 Pet. 497 (1840), from which appellant quotes (Appellant's Brief, p. 9), plainly has no applicability here: It held that mandamus does not lie to review a determination by an administrative officer on a question committed to his administrative judgment and discretion. The Court described, as "the ordinary duties of the executive departments of the government," the determination of questions committed to administrative discretion, not questions like the one involved in the case at bar, in which the Supreme Court reviewed the administrative determination and held it invalid.

like import which may hereafter be promulgated or attempted to be promulgated by the Department of Interior of the United States of America through its Fish and Wildlife Service or otherwise.”

There is, of course, no doubt that the district court would ordinarily have power to include such a provision in its decree. As the Supreme Court has said, “A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed . . .” *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426, 435 (1941). See also *National Labor Relations Board v. Swift & Co.*, 108 F. 2d 988, 990 (7th Cir. 1940).³ The only question then is whether the injunction challenged herein is substantially similar to the injunction of November 6, 1949.

To be in any degree effective, especially in the light of the Secretary’s reliance on mere formal revocation of the invalid regulation, the decree had to enjoin the enforcement not only of the existing invalid regulation, but also of any

³ *Addison v. Holly Hill Co.*, 322 U.S. 607, 620 (1944), quoted by appellant (Appellant’s Brief, p. 10), is obviously inapposite: It did not involve a suit for an injunction against an administrative officer; it was a suit by employees against their employer for wage payments under the Fair Labor Standards Act in which the Court, after holding invalid the part of the administrative regulations upon which the action depended, a definition of “the area of production” for purposes of exemption from the Act, remanded to the district court with directions to hold the case until the Wage and Hour Administrator made a redetermination, within his authority, as to the area of exemption. The language quoted is the Court’s answer to a suggestion that the Administrator, limited by the Court’s decision to defining the area of exception geographically and not by reference to the number of employees employed by an employer, might “resort to gerrymandering or to any other device to accomplish by indirection what the decision holds he cannot do directly.” See separate opinion of Mr. Justice Roberts, 322 U.S. 623, 624.

substantially similar future regulations. Obviously, the Supreme Court did not intend that the district court enter a bootless decree, one that would leave the Secretary and the appellant free to promulgate and enforce an unlawful regulation substantially like the one declared invalid. *Cf. McComb v. Jacksonville Paper Co.*, 336 U. S. 187, 192-193 (1949). The prospective aspect of the decree has no effect on appellant other than to preclude him from enforcing a regulation substantially like Regulation 208.23 (r) and thus evading the rulings of this Court, the district court and the Supreme Court. He can hardly contend that the Supreme Court intended to permit him to evade those rulings. He should not be heard to contend that he is injured by a provision insuring against such evasion.

The words "or otherwise" stand on the same footing. They merely proscribe the appellant from enforcing regulations substantially like the one held invalid which are promulgated by the Department of the Interior through agencies other than the Fish and Wildlife Service.⁴ The only effect of this language is to prevent the appellant, by any means, from evading the decree by a device which he would hardly contend that he intended to employ.

⁴It would seem that the Supreme Court anticipated this problem and had in mind that the District Court would so frame its decree. The Supreme Court did not direct that the decree simply restate the original injunction, but rather directed that it enter a decree "substantially as ordered in the permanent injunction entered November 6, 1946."

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court is in accordance with the opinion and mandate of the Supreme Court and should therefore be affirmed.

Respectfully submitted,

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